91-1710

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No. 91——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TOYOTA MOTOR CORPORATION, TOYOTA MOTOR SALES, U.S.A., INC., GULF STATES TOYOTA, and TOYOTA SOUTH, INC.,

Petitioners,

v.

THE HONORABLE SHAROLYN WOOD, Judge, 127th Judicial District Court, Harris County, Texas, (M. JACK HENRY and JANET HENRY, Individually, and M. JACK HENRY, Guardian of the Person and Estate of KAREN HENRY, and RON MANNING, as Representative of the Estate of JUDY NELSON MANNING, Real Paries In Interest),

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the First District of Texas

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QUESTION PRESENTED

Whether a State that grants its trial judges standardless, "unfettered" and unreviewable discretion to vacate a jury verdict and order a new trial deprives litigants of their property without due process of law in violation of the Fourteenth Amendment of the United States Constitution.

PARTIES

The plaintiffs below were M. Jack Henry and Janet Henry, Individually, and M. Jack Henry, Guardian of the Person and Estate of Karen Henry. The defendants were Toyota Motor Corporation (referred to incorrectly in plaintiffs' pleadings below as Toyota Motor Company), Toyota Motor Sales, U.S.A., Inc., Gulf States Toyota, and Toyota South, Inc., and Ron Manning, as Representative of the Estate of Judy Nelson Manning.

Petitioner Toyota Motor Corporation has no parent company. Its subsidiaries, other than wholly owned subsidiaries, are:

Toyota Automatic Loam Works, Ltd.
Aichi Steel Works, Limited
Toyota Machine Works, Ltd.
Toyota Auto Body Co., Ltd.
Toyota Tsusho Corporation
Aisin Seiki Co., Ltd.
Nippondensa Co., Ltd.
Toyota Boshoku Corporation
Town Real Estate Co., Ltd.
Toyota Central Research & Development Laboratories, Inc.
Kanto Auto Works, Ltd.
Toyota Gosei Co., Ltd.
Hino Motors, Ltd.
Daihatsu Motor Co., Ltd.
Toyota Canada, Inc.
New United Motor Manufacturing, Inc.
Toyota Technical Center, U.S.A., Inc.
Calty Design Research, Inc.
Toyota Motor Manufacturing, U.S.A., Inc.
Toyota Industrial Equipment Mfg., Inc.
Toyota do Brasil S.A., Industria e Comercio
Ensambladore Centroamericana de Costa Rica S.A.
Toyota del Peru S.A.
Compania Anonima Tocara

Toyota Gabelstapler Deutschland GmbH
Salvador Castano J.M.V.T., S.A.
Toyota Motor Corporation Australia Ltd.
United Australian Automotive Industries, Ltd.
T&K Autoparts Sdn. Bhd.
P.T. Toyota-Astra Motor
Toyota Motor Philippines Corp.
Toyota Autoparts Philippines, Inc.
Fung Yong Co., Ltd.
Kuozui Motors, Ltd.
Toyota Motor Thailand Co., Ltd.
Siam Toyota Manufacturing Co., Ltd.
DCM Toyota Ltd.
Toyotasa Toyota-Sabanci Otomotive Sanayi Ve Ticaret A.S.
New United Motor Manufacturing, Inc.
Servicios de Ensamblaje, C.A.
Manitou B.F.
Thai Hino Industry Co., Ltd.

Petitioner Toyota Motor Sales, U.S.A., Inc., is a wholly owned subsidiary of Toyota Motor Corporation. It has four subsidiaries that are not wholly owned: Toyota Motor Manufacturing, U.S.A., Inc.; Toyota Research and Development; Toyota Technical Center, U.S.A., Inc.; and Calty Design Research Inc. Petitioner Gulf States Toyota is an independent distributor and has no parent and no subsidiaries other than wholly owned subsidiaries. Petitioner Toyota South, Inc., was an independent dealer at the time the complaint was filed. It did not have any parent or subsidiaries. Since that time, Toyota South was purchased by Willis Toyota, which was purchased in turn by Bill Munday, Inc., dba Redbird Toyota, which has no parent and no subsidiaries.

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IN THE

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Petitioners,

v.

THE HONORABLE SHAROLYN WOOD, Judge, 127th Judicial District Court, Harris County, Texas, (M. JACK HENRY and JANET HENRY, Individually, and M. JACK HENRY, Guardian of the Person and Estate of KAREN HENRY, and RON MANNING, as Representative of the Estate of JUDY NELSON MANNING, Real Parties In Interest),

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On Petition for a Writ of Certiorari to the Court of Appeals for the First District of Texas

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the First District of Texas in this case.

OPINIONS BELOW

The opinion of the court of appeals, which is unreported, is included in the Appendix at pp. 1a-2a. The order of the Texas Supreme Court denying discretionary review, which is reported at 35 Tex. Sup. Ct. J. 581

(1992), is included in the Appendix at p. 3a. The order of the district court granting plaintiffs' motion for a new trial is not reported and is included in the Appendix at p. 4a. In addition, the transcript of the district court's hearing on plaintiffs' motion for a new trial, and plaintiffs' motion for a new trial, are included in the Appendix at pp. 5a-39a, and pp. 40a-46a, respectively.

JURISDICTION

The opinion and judgment of the court of appeals were entered on March 12, 1992. A timely petition for review in the Supreme Court of Texas was denied on March 25, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

The question in this case is whether, consistent with the Due Process Clause of the Fourteenth Amendment, a state may allow its trial judges "unfettered" and unreviewable discretion to set aside jury verdicts and order new trials. App. 1a. The facts that underlie this question are straightforward.

1. On June 11, 1985, Karen Henry was severely injured when the automobile that she was driving was struck by a Toyota pickup truck driven by Judy Nelson Manning. Manning was killed in the accident.

On August 18, 1986, Karen Henry's parents, M. Jack Henry and Janet Henry, sued Manning's estate. Plaintiffs alleged that Manning negligently lost control of her vehicle, crossed a grassy median separating highway

traffic, and collided with Henry's vehicle. Plaintiffs also sued petitioners Toyota Motor Corporation, et al., ("Toyota"). They claimed that a defect in the left rear brake of Manning's truck either caused it to veer out of control or prevented Manning from slowing the truck sufficiently to avoid colliding with Henry's vehicle. Toyota contested these allegations, arguing that the brake was not defective, that Manning never applied her brakes, and that there was no causal connection between the brakes and the collision.

2. The jury trial began on July 29, 1991. It lasted over four weeks. During trial, plaintiffs focused their case on Toyota. The centerpiece of the trial was a "battle" of competing experts who testified concerning the alleged defects in the brake. Very little evidence was directed toward Manning's involvement in the accident. E.g., App. 14a-15a, 16a, 21a. Indeed, in his lengthy opening statement (56 transcript pages), plaintiffs' counsel did not even mention the case against Manning; such an argument necessarily would have detracted from the claim that Toyota, the only defendant with resources to pay a multi-million dollar judgment, was responsible for plaintiffs' injuries. App 16a-18a.

The case was submitted to a 12-person jury on August 27, 1991. Two days later, the jury returned a unanimous verdict in favor of both defendants.

3. Plaintiffs moved for a new trial. They did not suggest that the trial court had committed any error. They argued only that the jury's verdict was unjust, unfair, and against the weight of the evidence. Their reasoning was that "the overwhelming evidence demonstrated that either Judy Manning or Toyota caused this accident. Karen Henry did not cause it. No other person caused it." App. 44a.

Plaintiffs observed that "Texas provides trial courts with unfettered discretion to grant a new trial." *Id.* at 42a. Plaintiffs further observed that, "[t]o protect this discretion, Texas prohibits appellate challenges to a trial

court's grant of new trial, either by mandamus or on appeal from a judgment in the second trial." *Id.* Plaintiffs noted that "Texas permits a trial court to grant a motion for a new trial even if the motion does not set forth a sound ground for a new trial," and that "a trial court does not have to give her reasons for granting a new trial." *Id.* Plaintiffs concluded by reminding the Court that a decision to grant a new trial "can never be reviewed by any other court or questioned by the parties," and by urging the Court to take advantage of this "singular opportunity for the Court to exercise its inherent powers in the service of justice." *Id.* at 45a.

The district court held a hearing on plaintiffs' motion on December 11, 1991. At that hearing, the district court emphasized that the jury's verdict in Toyota's favor was a "perfectly reasonable outcome given the evidence" (*id.* at 18a) and "a result that everyone expected might be the result of the jury trial." *Id.* at 35a. In the court's words:

> THE COURT: "I'll tell you, I was sick when I read the verdict if y'all didn't see it. I mean, they could have saved me a whole lot of problems by just saying Manning yes, Toyota no. Okay? And I'm only here today because they didn't.
>
> * * *
>
> THE COURT: [T]he question I had[,] to the point that I went back and looked up the cases myself within two or three days of your jury verdict[,] was: What do I do if I have a verdict that just goes whizzing by you as to one party, but on the other one is [a] perfectly reasonable outcome given the evidence?
>
> * * *
>
> THE COURT: Just understand that my position absolutely is that the result with regard to Toyota was a result that everyone expected might be the result of the jury trial. It's only, I think, as to the result to Mr. King's client [Manning] that gives the plaintiff the leg to come in and argue, "Hey, whatever went on in this trial was manifestly unjust."

Id. at 18a, 35a; see also *id.* at 30a (jury's verdict "was surprising to counsel, and I'll admit surprising to the Court, with regard to one defendant"); 20a (same); 13a.

Two days later, the court issued a summary order setting aside the judgment and granting a new trial as to all defendants without explanation. The order states only that "[u]pon consideration, this Court is of the opinion that a new trial should be granted." App. 4a.

4. Petitioners then sought a writ of mandamus in the Court of Appeals for the First District of Texas. In the brief, petitioners noted that mandamus was petitioners' only potential avenue for relief because Texas law forecloses review of a decision granting a new trial both on appeal from the order and after final judgment. Petitioners argued that mandamus was appropriate here because of the need to give Texas trial courts guidance as to the permissible grounds for exercising their discretion to order new trials, and because a failure to provide such guidance or any meaningful review violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The court of appeals refused to grant petitioners' request. In a brief opinion, the court stated simply that "[t]he trial court has *unfettered discretion* to grant or deny a motion for a new trial. *Champion Int'l Corp.* v. *Twelfth Court of Appeals*, 762 S.W.2d 898, 899 (Tex. 1988); *Johnson* v. *Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985)." App. 1a-2a (emphasis added). The Texas Supreme Court summarily denied Toyota's subsequent petition for review.

REASONS FOR GRANTING THE PETITION

The unfettered and unreviewable discretion to vacate jury verdicts and order new trials that Texas expressly grants to its trial courts is repugnant to the protection against arbitrary governmental action afforded every litigant by the Due Process Clause of the Fourteenth

Amendment. This case starkly illustrates the unfairness and arbitrariness that such discretion produces. Moreover, this case is merely symptomatic of a basic defect in the Texas system of civil justice for handling motions for new trial—a system wholly unlike that of any other American jurisdiction. While this Court need not require states to adopt one particular standard or procedure for deciding motions for a new trial, it must ensure that a state "imposes a sufficiently definite and meaningful constraint on the discretion" of its judges to ensure that the trial process does not become a mere charade. *Pacific Mut. Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032, 1045 (1991). This Texas has utterly failed to do.

1. The discretion of Texas trial judges to grant new trials is literally unfettered. The Texas Rules of Civil Procedure vest trial judges with "plenary power to grant a new trial" within 30 days of judgment. Tex. R. Civ. P. Ann. r. 329b(d) (West 1992). As the rule's unqualified language suggests, and as the court of appeals' decision below acknowledges, a Texas trial judge exercises this power without guidance or constraint.

A trial judge in Texas may set aside a jury verdict and order a new trial without offering any explanation of reasons, *e.g.*, App. 4a; *Johnson* v. *Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985); *Brown* v. *American Fin. Co.*, 432 S.W.2d 564, 567 (Tex. Civ. App.), *writ denied* (1968), without considering any particular factors in exercising discretion, *id.*, and even without holding a hearing. 4 McDonald, Texas Civ. Practice § 18.03 (rev. ed. 1981); *e.g.*, *Scott* v. *Scott*, 774 S.W.2d 307, 307 (Tex. Ct. App. 1989). More important still, the trial judge's decision to order a new trial is entirely shielded from appellate review, either on immediate appeal or from a final judgment after subsequent proceedings. *Ingersoll-Rand Co.* v. *Harrington*, 805 S.W.2d 597, 600 (Tex. Ct. App.), *writ denied* (1991) ("An order granting a new trial within that [statutorily allowed] period is not subject to review

either by direct appeal from that order, or from a final judgment rendered after further proceedings in the trial court"); *Cummins* v. *Paisan Constr. Co.*, 682 S.W.2d 235, 236 (Tex. 1984) (same).

Texas even narrowly limits appellate review on mandamus. A judge's new trial order is subject to review for abuse of discretion on mandamus only in two narrow and largely meaningless situations: (1) where the trial court was without jurisdiction, or (2) where the trial judge erred in concluding that special jury findings were in conflict. *Johnson* v. *Fourth Court of Appeals*, 700 S.W.2d at 918; *Johnson* v. *Court of Civil Appeals for the Seventh Supreme Judicial Dist.*, 350 S.W.2d 330, 331 (Tex. 1961).[1] These exceptions are concededly inapplicable in almost all cases.

The Texas Supreme Court strictly enforces these rules. It has made clear, for example, that it is an abuse of discretion for a Texas appellate court to set aside on mandamus a trial court's unexplained grant of a new trial. In *Johnson* v. *Fourth Court of Appeals*, 700 S.W.2d at 918 (Tex. 1985), one of the two cases on which the court of appeals relied (App. 2a), the Texas Supreme Court reversed a court of appeals' order on mandamus over-

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[1] The history of this rule illustrates its sheer arbitrariness. In the nineteenth century, the Texas Supreme Court permitted review of new trial orders by mandamus. *Lloyd* v. *Brinck*, 35 Tex. 1 (1872) (mandamus directing trial court to vacate new trial order). In 1911, without acknowledging this precedent, the court ruled that mandamus was available to overturn a trial judge's grant of a new trial only if the trial judge's action was "wholly and absolutely void." *Wright* v. *Swayne*, 140 S.W. 221, 222 (Tex. 1911). Fifteen years later, the Texas Supreme Court ignored *Wright* and relied upon *Lloyd* to issue mandamus where the trial judge had erroneously found an irreconcilable conflict in the jury's answers to "special issues." *Gulf, C. & S.F. Ry.* v. *Canty*, 285 S.W. 296 (Tex. 1926). The Texas Supreme Court subsequently "reconciled" these decisions in its present rule. *See Johnson* v. *Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985).

turning a trial court's unexplained order granting a new trial.[2] The court of appeals had granted mandamus because it believed that the trial court's order was based on the erroneous conclusion that the jury's answers were in conflict (one of the two recognized grounds for mandamus). In reversing that order, the Texas Supreme Court affirmed basic Texas principles that "[t]rial courts have always had broad discretion in the granting of new trials" (*Johnson*, 700 S.W.2d at 918) and that "mandamus will not issue to control the action of a lower court in a matter involving discretion." *Id.* at 917. The court then held that the trial court's action was permissible because the written order "did not specify conflict in [jury] answers for granting the motion," and because the judge, subsequent to his Delphic written order, had "stated: 'In total fairness of the entire case, the court is granting a new trial.'" *Id.* at 918.

In the other case relied on by the court of appeals below, the Texas Supreme Court again reversed a court of appeals' decision to grant mandamus overturning a trial court order setting aside a jury verdict and ordering a mistrial. *Champion Int'l Corp.* v. *Twelfth Court of Appeals*, 762 S.W.2d 898 (Tex. 1988). In granting mandamus, "[t]he court of appeals reasoned that . . . it was an abuse of discretion for the trial court to [grant a new trial] without stating 'adequate legal grounds.'" *Id.* at 899. The trial court's "letter order" (like the order in this case, see App. 4a) stated simply that "'[t]he court has carefully considered the entry of Judgment in this case and finds that a mistrial would be in the best interest of justice because Judgment cannot be entered on the

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[2] The trial court's order stated, in full:

> After reading said motion for new trial and hearing argument of counsel on said motion for new trial, [the trial court] finds that said motion is good and that a new trial should be granted.

Johnson, 700 S.W.2d at 918. The order thus resembles the order at issue in this case, which also granted a new trial without providing any reason. *See* App. 4a.

verdict for either party with that degree of certainty required.'" *Id.* (emphasis omitted). Relying on *Johnson*, however, the Texas Supreme Court held that this order sufficed to indicate that the new trial had been ordered pursuant to the trial court's "broad discretion" to "grant a new trial 'in the interest of justice.'" *Id.* (quoting *Johnson*, 700 S.W.2d at 918).

The *Johnson* and *Champion* cases thus stand unequivocally for the proposition that was the basis of the judgment below: A trial court has "unfettered discretion" to grant a new trial. App. 2a. No statement of reasons is required. No review is allowed at any time. The trial court's absolute discretion was not lost on the trial judge in this case. Plaintiffs emphasized these very points in their motion for new trial. App. 42a, 45a. This grant of unfettered discretion to trial courts violates the Due Process Clause.

2. It is a first principle that "the Due Process Clause, like its forebear in the Magna Carta, . . . was 'intended to secure the individual from the arbitrary exercise of the powers of government,' *Hurtado* v. *California*, 110 U.S. 516, 527 (1884) (quoting *Bank of Columbia* v. *Okely*, 4 Wheat. (17 U.S.) 235, 244 (1819))." *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986). "The touchstone of due process is protection of the individual against arbitrary action of government, *Dent* v. *West Virginia*, 129 U.S. 114, 123 (1889)." *Wolff* v. *McDonnell*, 418 U.S. 539, 558 (1974). This Court's decisions under the Due Process Clause reflect this constitutional imperative to protect litigants against arbitrary deprivation of life, liberty or property.

This Court has invalidated vaguely worded state laws, for example, because they leave the execution or application of the law to the standardless discretion of state officials, judges or juries. *E.g.*, *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983) (invalidating statute that "vests virtually complete discretion in the hands of the police");

Giaccio v. *Pennsylvania*, 382 U.S. 399, 402-03 (1966) (invalidating law that "leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not"); *Smith* v. *Goguen*, 415 U.S. 566, 574 (1974) (vagueness doctrine rooted primarily in need for "legislature [to] establish minimal guidelines to govern law enforcement"). Similarly, this Court has refused to afford agency officials "unlimited discretion" to exercise their statutory authority, insisting on a statement of reasons that "articulate[s] [a] rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 165, 168 (1962); see *Goldberg* v. *Kelly*, 397 U.S. 254, 271 (1970); *Wichita R.R. & Light Co.* v. *PUC*, 260 U.S. 48, 57-59 (1922).

Most recently, in *Pacific Mutual Life Insurance Co.* v. *Haslip*, this Court affirmed that a state may not delegate either to judges or juries unlimited discretion to award punitive damages. "One must concede that unlimited jury discretion—*or unlimited judicial discretion for that matter* —in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." 111 S. Ct. at 1043 (emphasis added). "As long as the discretion is exercised within reasonable constraints, [however,] due process is satisfied." *Id.* at 1044. As several state and federal courts have ruled in the months since *Haslip* was decided, punitive damages in the absence of such reasonable constraints violate the Fourteenth Amendment.[3]

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[3] *See Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897, 908 (W. Va. 1991) (invalidating award of punitive damages where constraints "were neither meaningful nor adequate under the standards established in *Haslip*"); *Mattison* v. *Dallas Carrier Corp.*, 947 F.2d 95, 101-08 (4th Cir. 1991) (South Carolina); *Johnson* v. *Hugo's Skateway*, 949 F.2d 1338, 1350-52 (4th Cir. 1991) (Virginia). *See also Haslip*, 111 S. Ct. at 1045 n.10 ("distinguish[ing] Alabama's system from the Vermont and Mississippi schemes about which Justices [previously] expressed concern").

There can be no question that a significant deprivation of property is at stake here. See, *e.g.*, *Wolff* v. *McDonnell*, 418 U.S. at 557-58 (due process required in "the operation of state dispute-settlement mechanisms, when one person seeks to take property from another"); *Lindsey* v. *Normet*, 405 U.S. 56, 64-69 (1972) (accepting without question tenant's property interest in standards governing eviction suit); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The loss of the jury's verdict, in a case where plaintiffs are seeking compensatory damages in excess of $19 million, is plainly significant. And even if defendants were to prevail again on retrial, which is by no means certain given the nature of jury trials and the importance of expert testimony to this case, they can never recover the substantial expenses —or the lost time of engineers and other employees— associated with the first trial, which lasted over four weeks.

The only question, therefore, is whether Texas has placed "reasonable constraints" on the discretion of its trial judges to order such a deprivation. *Haslip*, 111 S. Ct. at 1044. It plainly has not. The trial court's discretion concededly is unfettered.

To put such sweeping discretion in perspective, it is useful to compare the Texas procedure for setting aside jury verdicts with the Alabama procedure for reviewing the jury's award of punitive damages discussed in *Haslip*. *None* of the three constraints on discretion present in *Haslip* is part of the Texas scheme.

First, the Court noted in *Haslip* that the jury's "discretion was not unlimited" because "instructions . . . enlightened the jury" as to the appropriate grounds on which a punitive damages award could be based. 111 S. Ct. at 1044. In Texas, state courts have "unfettered discretion" (App. 1a) and "plenary power to grant a new trial" for *any reason*. *Scott* v. *Scott*, 774 S.W.2d 307, 308 (Tex. Ct. App. 1989).

Second, the Court approved Alabama's scheme in *Haslip* because it "ensure[d] meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages." 111 S. Ct. at 1044. For example, "trial courts [were required] 'to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so' " and the Alabama Supreme Court had specified the "factors" that courts were permitted to consider. *Id.* In contrast, Texas has not specified the factors its trial courts are permitted to consider, and it does not require them to offer any explanation for their decision.

The third constraint deemed important in *Haslip* was appellate review. Such review "provides an additional check on the jury's or trial court's discretion" and makes "certain that the punitive damages are reasonable in their amount and rational in light of their purpose." *Id.* at 1045. In Texas, entire jury verdicts are set aside without *any* possibility of appellate review.

It is completely anomalous to require a state to provide certain minimum protections to prevent an admitted wrongdoer from being unduly punished, but to allow a defendant found innocent by a properly instructed jury to endure a retrial at the whim of a single state official. Yet, that is the anomaly that the Texas approach creates.

The constraints on discretion identified in *Haslip* are neither burdensome nor unduly confining. They provide a modest but vital check on the potential for unfairness and bias in any judicial proceeding. Standards to guide decisionmaking, a rational basis for decision that is expressly stated in the record, appellate review—these are familiar, core attributes of the Anglo-American legal system. Some or all of them are present and are required to be present, in varying degrees of elaboration, whenever the government acts in any significant manner to affect an individual's life, liberty or property. Yet, in allowing trial courts unfettered discretion to order new

trials, Texas has done away with all of them. There is no due process, in any historical or contemporary sense of the term, in a system that allows a judge without explanation or review to throw out a verdict that she described two days earlier in open court as a "perfectly reasonable outcome given the evidence." App. 18a.

3. Although not dispositive, the history and typicality of a particular procedure are relevant to the due process analysis. If Texas' approach were no different than that of most states, one might "need a strong case for the Fourteenth Amendment to affect it." *Haslip*, 111 S. Ct. at 1043 (citation omitted). Not surprisingly, in providing its trial courts with standardless, unfettered, and unreviewable discretion to grant new trials, Texas stands alone.

Outside of Texas, the universal rule is that a trial judge's decision to grant a new trial is subject to appellate review for abuse of discretion.[4] Most jurisdictions afford litigants an immediate appeal.[5] The remaining jurisdictions at a minimum allow an appeal following judgment in the subsequent trial and many of these also allow an immediate appeal at the discretion of the court.[6]

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[4] *See* App. 47a-52a (summarizing state law). *See generally* 11 C. Wright & A. Miller, Federal Practice & Procedure § 2818 (1973 & Supp. 1992); 6A J. Moore & J. Lucas, Moore's Federal Practice 2d ¶ 59.15[3] (rev. ed. 1991); 58 Am. Jur. 2d, *New Trial* § 213 (1989 & Supp. 1992).

[5] *See* App. 53a-57a.

[6] *Id.* The federal rule allows appeal after final judgment. *Allied Chem. Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (per curiam); *see* 11 C. Wright & A. Miller, Federal Practice and Procedure § 2818 (1973 & Supp. 1992). In *Daiflon*, this Court held that, in light of the availability of review on appeal from a final judgment, federal courts should not review such orders for abuse of discretion on petitions for a writ of mandamus. 449 U.S. at 36. In seeking mandamus review in Texas state court, petitioners attempted to avail themselves of the only potential avenue of review that

In addition, all other jurisdictions have expressly identified limits to a trial court's discretion. The general rule is that a trial judge's discretionary grant of a new trial "must be a *sound legal discretion* in accordance with recognized principles of law, rather than an arbitrary discretion exercised at will." [7] Orders granting a new trial are overturned if the trial court misapplied the law, exceeded the limited role allowed the court in reviewing the evidence, or acted arbitrarily in reaching the decision.[8]

Thus, the basic constraints on discretion identified in *Haslip*—express limits on the scope of discretion enforced by meaningful appellate review—are imposed by all jurisdictions, except Texas. Furthermore, in some

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Texas offers. In seeking relief in this Court, petitioners do not ask the Court to disturb the federal rule, but simply to recognize that at some point—whether on interlocutory appeal or after final judgment—meaningful constraints on a trial court's discretion must be imposed.

[7] *Dodson* v. *Henderson Properties, Inc.*, 708 P.2d 1064, 1065 (Okla. 1985). *See, e.g., Vargo* v. *Denison*, 364 N.W.2d 376, 377 (Mich. Ct. App. 1985) ("[T]he rule does not give a trial judge unlimited power to grant a new trial merely because he does not agree with the verdict") (internal quotation marks and citation omitted); *Phar-Mor of Fla., Inc.* v. *Steuernagel*, 550 So.2d 548, 550 (Fla. Dist. Ct. App. 1989); *Jawad* v. *Granade*, 497 So.2d 471, 476-77 (Ala. 1986); *Price-Orem Inv. Co.* v. *Rollins, Brown & Gunnell, Inc.*, 713 P.2d 55, 57-58 (Utah 1986); *Reiboldt* v. *Bedient*, 562 P.2d 991, 994 (Wash. Ct. App. 1977).

[8] *See, e.g., Burggraf* v. *Chaffin*, 823 P.2d 775, 777-81 (Idaho 1991) (overturning trial court's grant of new trial); *Heideman* v. *American Family Ins. Group*, 473 N.W.2d 14, 21-22 (Wis. Ct. App. 1991) (same); *Kumar* v. *Douglas County*, 452 N.W.2d 21, 24-25 (Neb. 1990) (same); *Phar-Mor*, 550 So.2d at 550-51 (same); *Menard & Co. Masonry Bldg. Contractors* v. *Marshall Bldg. Sys., Inc.*, 539 A.2d 523, 527-28 (R.I. 1988) (same); *Dodson*, 708 P.2d at 1065-68 (same); *Jawad*, 479 So.2d at 476-77 (same); *Linquist* v. *Moran*, 662 P.2d 281, 284-85 (Mont. 1983) (same); *Storey* v. *Camper*, 401 A.2d 458, 466-67 (Del. 1979) (same).

jurisdictions, appellate courts will overturn new trial orders where the trial court has failed to explain the reason for its order,[9] and appellate courts will "exercise particularly close scrutiny" where the basis of the new trial is the trial judge's assessment of the weight of the evidence rather than a finding of legal error.[10]

The settled practice in all other jurisdictions demonstrates that imposing reasonable constraints on the discretion of trial courts to grant new trials is neither unusual nor burdensome. Indeed, Texas itself provides appellate

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[9] As one court unassailably put it, "how [can] we . . . truly say that the trial court has not abused its discretion when we do not know the reasons for its ruling on the new trial motions?" *Quick* v. *Crane*, 727 P.2d 1187, 1199 (Idaho 1986); *see also Placido Gardens Condominium Ass'n* v. *Johnson*, 563 So.2d 826, 828 (Fla. App. Dist. Ct. 1990); *Storey*, 401 A.2d at 466; *cf. Antal* v. *Olde Worlde Prods., Inc.*, 459 N.E.2d 223 (Ohio 1984) (applying state rule requiring statement of reasons); *Borowski* v. *Rupert*, 281 N.E.2d 502, 507 (Ind. Ct. App. 1972) (same); *Scala* v. *Jerry Witt & Sons, Inc.*, 475 P.2d 864 (Cal. 1970) (same).

Federal courts are not required to make formal findings of fact or conclusions of law when granting a new trial motion. Fed. R. Civ. P. 52(a). But that does not mean that courts are free to forgo providing any reasons. As this Court recognized in *Goldberg* v. *Kelly*, 397 U.S. 254, 271 (1970), a decisionmaker can "state the reasons for his determination and indicate the evidence he relied on [without providing] a full opinion or even formal findings of fact and conclusions of law." (citation ommitted)

[10] *Shows* v. *Jamison Bedding, Inc.*, 671 F.2d 927, 930 (5th Cir. 1982). *See Wangen* v. *Knudson*, 428 N.W.2d 242, 246 (S.D. 1988) ("close scrutiny" required where judge has effectively "substituted his judgment of the facts and the credibility of the witnesses for that of the jury" to avoid "denigration of the jury" and "to protect the litigants' right to a jury trial") (quoting *Lind* v. *Schenley Indus., Inc.*, 278 F.2d 79, 90 (3d Cir.) (en banc), *cert. denied*, 364 U.S. 835 (1960)); *McNeal* v. *Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637, 646-47 (D.C. Cir. 1988); *Ard* v. *Southwest Forest Indus.*, 849 F.2d 517, 520 (11th Cir. 1988); *Venegas* v. *Wagner*, 831 F.2d 1514, 1519 (9th Cir. 1987); *Marotta* v. *General Motors Corp.*, 483 N.E.2d 503, 507 (Ill. 1985); *Jawad*, 497 So.2d at 472-73.

review for abuse of discretion when a trial court denies a motion for a new trial, a fact that illustrates both the minimal costs of such constraints and the arbitrariness of Texas' contrary rule with respect to orders granting new trials.[11] Against this backdrop of settled law, the failure in Texas to provide litigants with any protection against arbitrary judicial decisions to set aside reasonable and hard-earned jury verdicts is starkly and unconstitutionally out of place.

4. The interlocutory posture of this case is no reason for this Court to deny review; indeed, it is a compelling reason to act. To be sure, it is possible that, on retrial, petitioners may again prevail. Indeed, petitioners would expect to do so. But even if petitioners should prevail, they would have no remedy for the substantial deprivation—the expense of a four-week trial—imposed by entirely arbitrary and standardless governmental action. Moreover, nothing would restrain the trial judge from once again granting a new trial. And if petitioners were to lose on retrial, they would have no appellate remedy for the arbitrary new-trial order because Texas law squarely forecloses appellate review of an order granting new trial after final judgment. See *supra* pp. 6-7.

Several members of this Court recently have expressed concern about the impact of standardless discretion on the civil justice system.[12] Nevertheless, the Court has

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[11] *E.g.*, *Strackbein* v. *Prewitt*, 671 S.W.2d 37, 38 (Tex. 1984) (" '[w]hile trial courts have some measure of discretion in [denying a motion for new trial,] . . . it is not an unbridled discretion to decide cases as they might deem proper, without reference to any guiding rule or principle' ") (quoting *Craddock* v. *Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939)); *Equitable Gen. Ins. Co.* v. *Yates*, 684 S.W.2d 669 (Tex. 1984); *Sisco* v. *Briones*, 809 S.W.2d 524 (Tex. Ct. App. 1991); *Johnson* v. *Rancho Guadalupe, Inc.*, 789 S.W.2d 596 (Tex. Ct. App.), *writ denied* (1990).

[12] *See, e.g.*, *Browning-Ferris Indus., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., joined by Stevens, J., concurring in part and dissenting in part) (noting "detrimental effect"

rightly been reluctant to constitutionalize the state trial process. But what the Court began in *Haslip* by setting out the basic features of a fair process, it should continue here by invalidating a unique state rule that contains none of those features. Such a ruling need not and would not prompt myriad due process challenges to state procedural rules—all other states meet the *Haslip* standard as a matter of course. Nor does the Court need to impose a single set of procedures on the states; enforcement of the minimum requirement of "reasonable constraints" on judicial decisionmaking leaves ample room for experimentation and diversity.

There is no persuasive argument, however, in defense of unfettered discretion. It contradicts the fundamental premise of the "supremacy of law," which is "that the sovereign and all its agencies are bound to act upon principles, not according to arbitrary will; are obliged to follow reason instead of being free to follow caprice." R. Pound, *The Spirit of the Common Law* 183 (1921). Absent reasonable constraints on individual discretion, the potential for abuses of power, subtle and appalling, is manifest.[13] Simply put, Texas' delegation of unfettered

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of "sky-rocketing" damages awards on allocation of economic resources and product innovation); *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 88 (1988) (O'Connor, J., joined by Scalia, J., concurring in part and concurring in the judgment) ("This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process").

[13] There is at least reason to worry about whether such a procedure will unfairly benefit in-state plaintiffs at the expense of out-of-state, 'deep-pocket' defendants. The untamed discretion of the Texas courts in the *Pennzoil* case led the West Virginia Supreme Court recently to castigate Texas for allowing Pennzoil to benefit from "trumped up law and hard core home cooking." *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897, 907 & n.5 (W. Va. 1991). Although the judge's motives in this case may not be subject to such harsh criticism, any system of unchecked discretion will be subject to abuse and to just criticism, and will erode respect for the rule of law.

and unreviewable discretion to its trial judges cries out for reversal. This Court should reaffirm its basic commitment to fair process throughout the judicial system.

Indeed, no hypothetical case could better illustrate the arbitrariness and rank unfairness inherent in Texas' system of unfettered discretion than this case. There was nothing wrong with the trial of this case. No legal error was even alleged. The trial court did not make even the most perfunctory effort to explain the reasons for setting aside the jury's verdict as to all defendants rather than just as to Manning. Her order provides no clue as to why she might have concluded that a verdict that she described as "perfectly reasonable" as to Toyota on a Wednesday could be properly set aside on a Friday. In short, the naked result reached below is undignified by even the sheerest threads of reasoned decisionmaking.

Most troubling is the fact that this egregious result—the arbitrary action of an unfettered judge—is not itself a random product. Rather, it is the inevitable outcome of a system that places no constraints on the decisionmaking of elected officials. Texas, by intentional design, has created that system. Texas, despite numerous opportunities, has declined to modify and correct it. The time has come for this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may also wish to consider entering an order summarily reversing the order denying mandamus relief.

Respectfully submitted,

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April 24, 1992

* Counsel of Record

APPENDICES

APPENDIX A

COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS

No. 01-92-00234-CV

TOYOTA MOTOR COMPANY, TOYOTA MOTOR SALES, U.S.A., INC., GULF STATES TOYOTA, INC., and TOYOTA SOUTH, INC.,

Relators

v.

THE HONORABLE SHAROLYN WOOD, JUDGE OF THE 127TH DISTRICT COURT OF HARRIS COUNTY, TEXAS,

Respondent

Original Proceeding on Motion for Leave
to File Petition for Writ of Mandamus

Motion for Leave to File Petition for Writ of
Mandamus overruled, and Opinion filed
March 12, 1992

OPINION

Relators seek mandamus ordering the trial judge to vacate her order granting a new trial in this case. The trial court has unfettered discretion to grant or deny a motion for new trial. *Champion Int'l. Corp. v. Twelfth Court of Appeals*, 762 S.W.2d 898, 899 (Tex. 1988);

Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 918 (Tex. 1985).

Accordingly, we overrule relators motion for leave to file a petition for writ of mandamus.

PER CURIAM

Panel consists of Justices Bass, Cohen and Wilson.

Do not publish. TEX. R. APP. P. 90.

Judgment rendered and opinion delivered Mar. 12, 1992.

True Copy Attest:

/s/ Kathryn Cox
KATHRYN COX
Clerk of Court

APPENDIX B

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

March 25, 1992

RE: Case No. D-2225

Style: TOYOTA MOTOR COMPANY, TOYOTA MOTOR SALES, U.S.A., INC., GULF STATES TOYOTA, INC. and TOYOTA SOUTH, INC.
v. THE HONORABLE SHAROLYN WOOD, JUDGE

Dear Counsel:

Today, the Supreme Court of Texas overruled relator's motion for leave to file petition for writ of mandamus in the above styled case. Motion for temporary relief is also overruled.

Sincerely,

JOHN T. ADAMS
Clerk

by /s/ Blanca E. Morin
BLANCA MORIN
Deputy

cc: Hon. Sharolyn P. Wood

APPENDIX C

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
127TH JUDICIAL DISTRICT

No. 86-35520

M. JACK HENRY and JANET HENRY, Individually, and M. JACK HENRY, Guardian of the Person and Estate of Karen Henry

v.

TOYOTA MOTOR COMPANY, TOYOTA MOTOR SALES, U.S.A., INC., GULF STATES TOYOTA, INC., TOYOTA SOUTH, INC., TOYOTA AUTOBODY, INC. OF CALIFORNIA, f/k/a TOYOTA MOTOR MANUFACTURING, U.S.A., INC., and RON MANNING, as Representative of the Estate of Judy Nelson Manning

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ORDER

On 12-11-91, came on to be considered Plaintiffs' Motion for New Trial. Upon consideration, this Court is of the opinion that a new trial should be granted. It is, therefore,

ORDERED that the judgment in this case be, and hereby is, set aside, and that a new trial be held.

SIGNED this 13th day of December, 1991.

/s/ Sharolyn Wood
Judge Presiding

DWHjws
9827

APPENDIX D

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
127TH JUDICIAL DISTRICT

No. 86-35520

M. JACK HENRY, *et al.*

VS.

TOYOTA MOTOR COMPANY, *et al.*

Motion for New Trial

BE IT REMEMBERED that the above entitled and numbered cause came on for hearing before the Honorable Sharolyn Wood, Judge Presiding, at the Civil Courts Building, Houston, Texas, on the 11th day of December, 1991 and the following proceedings were had:

THE COURT: Tell me what your motion is. By the way, I told that there was a response filed yesterday that I don't have. I have a Motion for New Trial by plaintiff. I have a response by Toyota. And that's it. Do I understand that you filed a response yesterday?

MR. KING: Your Honor, I believe that my response was filed—probably filed yesterday.

THE COURT: It was filed down stairs. We know of it, but it is in the bend that gets delivered to me at 10:00 o'clock.

MR. KING: I don't think there is anything in it—

THE COURT: Do you have a copy?

MR. KING: I don't have a copy, but Mr. Donnell does have a copy.

THE COURT: If I could borrow Mr. Donnell's copy, I would appreciate it. And it has been filed. It's, quote, in the file, it just isn't in the file in front of me. Okay? Because it got, I think, routed to closed files, because this is a disposed case, but they are retrieving it, so we can get it in into the Motion for New Trial file. We will proceed. If would you tell me what plaintiff's motion is all about.

MR. FISHER: May I proceed, your Honor?

THE COURT: Yes, sir.

MR. FISHER: Your Honor, the court will remember, and I won't belabor the extensive evidence in this trial. The Court recalls that vividly, I'm sure. This is a case that seems to me that indicates a fundamentally unjust result in that the evidence that was presented in the trial of the case clearly demonstrated, as a matter of fact, almost with agreement between the parties, that there was responsibility on the part of one or other, one or either, or both of the defendants. But there was absolutely not any evidence offered by anybody or any explanation offered by anybody that this was an event to which there was no responsibility by any party.

We start off with the basic recollection and understanding that from the standpoint of the plaintiff in this case no one ever suggested or even pleaded that Karen Henry had any responsibility in the accident. And with respect to the two defendants, while there was disagreement between the defendants among themselves as to which one of them was responsible, the Court will recall the position, I would like elaborate just very briefly in a moment of more specifically about what, in fact, was even said the jury in that regard.

This is a case in which it's difficult, I think, to point specific reasons that say, well, ah-ha that is the reason why a jury would do exactly what he did. There is a lot—there's several things that did occur during the trial of the case, but in candor of the Court, I can't assure the Court, okay, I know for a fact that the lady who

was the for—turned out to be the forelady of the jury, who claimed to have some knowledge of voir dire perhaps of the plaintiffs and who claimed to have eight to ten separate trials.

THE COURT: No. It was Mrs. Manning. It was the deceased lady that she knew.

MR. FISHER: Yes, Ms. Manning. And claiming to have that, and then whatever influence that seems to give her over the other jurors, you know, I'm not saying that I can say to the Court that's the reason, whether it's side bar—the side bar quote about sandbagging that was read to the jury. I can't say and tell the Court, well, that is the one thing that led to this result. Something did. Something did.

And the cases say that if the Court thinks that the—and this is Wichita Falls Tractor versus Cook, as early as 1933, where the Texas Commission of Appeals specifically said that if the Court thinks that the ends of justice have not been attained by the verdict of the jury, it is clearly its duty to set aside the judgment and rendered on the verdict.

That sort of language is contained in a number of cases, and I would like—I won't read extensively, but there is some language, your Honor, in Equitable Life Insurance Company versus Murdock, 219 SW 2d at Page 165, that I think is apprapro to what happened here, where you have a case where all of the parties try a case for a month saying this is somebody's responsibility. Toyota says, "Well, we don't think it's ours. We think it's the driver of the Toyota." And where the driver of the Toyota's counsel says, "No, we think it's Toyota." But we are basically in agreement that there are explanations and evidence that explains that something was amiss.

In Equitable Life Insurance versus Murdock, the Court —the Commission of Appeals observed, "The greater latitude is allowed the trial court in granting than in refusing new trials, since in such cases the rights of the parties are not finally settled."

"There are many apparent reasons why the trial court is permitted to exercise so liberally this inheren power and discretion. The trial court, having the parties, the witnesses, and counsel before it, and the opportunity to observe their demeanor and conduct during the trial and to note all incidents occurring during its progress likely to effect the results of the trial, is better qualified to judge whether a fair trial has been had and substantial justice done than is the appellate court."

And so I think that's the most apprapro of observations by the Court, your Honor.

In Schmeltekopf, Scotty, that S-C-H-M-E-L-T-E-K-O-P-F, versus Johnson Well Service, the Court observed that a jury's failure to find the fact—and its a little convoluted—a jury's failure to find a fact need not be supported by any evidence, but the jury may not refuse to find a fact in the face of overwhelming evidence of the existence of the fact.

Here the jury refused to find any responsibility on anyone's part, when there was overwhelming evidence in the record of the fact that someone was, in fact, responsible for this. And the Court says the jury may not refuse, in the face of instructions from Your Honor, the Court, as to facts that they are obligated to follow the rules dealing with preponderance of the evidence, the jury may not refuse to find a fact, in the face of overwhelming evidence of the existence of the fact.

The Russell versus Hanverson case, 771 SW 2d 652, the Court observed—and this is pretty elementary basic law, but apprapro here, "So considering the evidence, if a jury finding is so contrary to—if so contrary to the great weight and preponderance of the evidence as to be manifestly unjust, the point should be sustained regardless of whether there is some evidence to support it."

It's not a question in looking at this of whether we could search the record microscopically and find some evidence to support what the jury did. If the jury's answers are against the great weight and preponderance of the

evidence so as to be manifestly unjust, we think in the interest of justice, your Honor, a new trial should be granted.

THE COURT: I assume you're referring to the jury's answer to the question with regard to Mrs. Manning's conduct?

MR. FISHER: Both of them. I think that—in particular, Mrs. Manning, yes, ma'am, but I think that a verdict that says "No" to both parties taints the entire verdict with respect to—with respect to the fact that they in some way are not following their instructions and are not basing their decision based on the evidence, but on other factors, whatever they may be.

So whether it was Toyota or whether it was Mrs. Manning, we are certainly—the parties were certainly basically in agreement throughout the trial that the evidence clearly showed that if there wasn't something wrong with the brakes, the conduct of Mrs. Manning was—

THE COURT: Even if there was, I thought the conduct that, whatever it was that everybody said she did.

MR. FISHER: Yes, ma'am.

THE COURT: Did anyone request an instruction from the court on anything—did I refuse any instruction, does anybody know, on sudden emergency or any of these inferential rebuttal issues?

MR. FISHER: Not that I recall.

THE COURT: I just checked the verdict and there was not an instruction such as that in the verdict—in the charge.

MR. FISHER: I do not recall such an instruction. There was some reference to argument. On Page 102 of the closing arguments, I argued to the jury, specifically, your Honor, on page — really on Page 103—

THE COURT: Page 103?

MR. FISHER: Page 103, your Honor. What I'm trying to do here is to not necessarily say that argument

reflects what a jury is compelled to do, one way or the other. I certainly wouldn't suggest that to this Court. I'm merely trying to, from a few extracts here, demonstrate to the Court the clear understanding that the parties to this litigation had about the evidence in the case.

And on Page 103 I said, "The next issue will ask you to compare the conduct of Judy Manning and Toyota, which is issue No. 3. And it's going to say that your answer must total a hundred percent. And I say, ladies and gentlemen, that in answering that, it's up to you to answer whatever those percentages are, but I plead with you from the evidence to hold Toyota to at least, you know, to at least 50 percent or more with respect to that issue."

There never was any inference by me that there should not be any finding, for example, against Judy Manning.

With respect to Mr. Platt's argument, on Page 125, Mr. Platt said, lines 10 through 15, "First of all, the accident happened because Judy Manning lost control of her truck. She got distracked, veered off to the road, turned too sharply at too high a speed, and slid across the rain slicked highway."

Mr. Platt on Page 129, lines 14 through 20, "Again Officer Fulce went back to the wet road with a speed of 50 to 55 miles an hour, quote, would have been a safe speed—Would it have been a safe speed on the road with it slick and wet? Question mark. And he's quoting Mr. Fulce. "No, it would not have. Any time the roads are wet, it's going to take persons longer to stop if they apply their brakes.

Page 130, Mr. Platt, lines 4 through 9—I'm sorry, through 11. "Remember everybody agrees, both Walter Reed and Mr. Carr, that this lady was traveling in excess of 50 miles an hour on the right shoulder at the time this whole accident started. So you're talking about very high speed, on a very wet roadway. This was an accident, as you can see in a minute, that was going to happen."

Mr. Platt, Page 192, "Finally from Lee Carr, it's a formula for disaster to do what Judy Manning did that day. When Judy Manning cranked in that left turn, it was over. It was over."

With respect to Mr. King, Mr. King argued that the responsibility was on the part of Toyota; did so specifically on pages 217 where he says, "It's my opinion that the sole cause of this accident is Toyota." And where he said on Page 227, "And I think their equal failure to do that is an absolute justification and mandate to answer Question No. 1 yes.

This illustrates that in a well developed, well-tried case, that had excellent supervision by the Court, that the jury failed to find responsibility on any party, whether it be Toyota or Judy Manning, when the overwhelming great weight and preponderance of the evidence as reflected by the arguments of counsel and the presentation of the evidence through the experts, there was no—for example, there was no evidence offered to the contrary that this lady was, in fact, traveling at least 50 to 55 miles an hour on a wet road, when she did, in fact, crank in the left turn. With respect to the—so the jury's failure to find either party, it seems to me, justifies and mandates a new trial in the entire case, your Honor, it seems to us.

We ask the Court in our motion—we ask the Court to exercise your inherent power, and grant us a new trial, your Honor, because it does reflect that this jury, for whatever reasons they had, did not follow the mandate instructions of the court and return a verdict based upon the evidence that was developed in open court, but on other reasons that were personal and private perhaps to them, but that did not reflect that they followed the Court's instruction.

Thank you, your Honor.

THE COURT: Mr. Gilpin, Mr. Platt is going to argue for you?

MR. GILPIN: Yes, your Honor.

THE COURT: You may proceed.

MR. PLATT: Thank you, your Honor.

Your Honor, as I think is evidence from the briefs, I don't think there is any quarrel about the law. No one urges that your Honor doesn't have discretion to order a new trial if, in fact, the verdict that was rendered is not supported by the evidence and doesn't do justice.

I think the real issue that your Honor needs to review is how this verdict came to pass and why it's the way it is.

And I would like to start by commenting on a couple of points that Mr. Fisher made. Because I think to some degree, your Honor, the trial that he perceived today to have occurred is not the trial that, in fact, occurred in August. He made several statements, and I tried to sort of write down the gist of them. And I think this will capture the reasons for the disagreement between the defendants and the plaintiff on this motion.

There was unanimous agreement on one point. There is no quarrel about that. Unanimous agreement between among the parties to the litigation was that Karen Henry did not cause the accident. And there was unanimous agreement.

THE COURT: That wasn't even submitted to the jury.

MR. PLATT: That's correct. From the get go, in the very beginning, we all acknowledged that she was an innocent victim. That's where Mr. Fisher's argument, I think, begins to divert from the facts, however. There clearly was not unanimous agreement among the parties that either Toyota or Judy Manning was responsible. He says there was unanimous agreement that there was responsibility on the part of one of the defendants. That is not true in the evidence. He says all of the parties said the accident was the fault of one of the defendants; not true. He says there was overwhelming evidence that one of the defendants was responsible; not true.

Here's what really happened. And I understand we're dealing with one trial with two defendants, but we must separate it.

With respect to the case against Toyota, there was the most vigorously contested liability issue that I've had for awhile. You couldn't have sat here and listened to two—

THE COURT: Could have gone either way.

MR. PLATT: And in another courtroom on another day it might go the other way. I don't know. Jurors all do different things.

THE COURT: Hang on. Let me see what my juror's questions here.

(Short recess)

THE COURT: Sorry to interrupt.

MR. PLATT: Your Honor, if this case—if Mrs. Manning was not in the case at all, I wonder what counsel's argument would be, because—

THE COURT: There would be none.

MR. PLATT: So with respect to the case against Toyota, there is no way, I don't believe, that it can fairly be argued that the evidence does not support the verdict.

THE COURT: Let me correct my statement. It's not that there would not be one, but there would not be a result to point that surprised the lawyers.

MR. PLATT: I think that's true. And I will concede that when you hear the argument this morning, it sure sounds like this hadn't ought to turn out this way, but I submit there is a good reason why it did. Because here's the way the case really got tried is—the reason that Mr. Fisher points to some phrases in my closing argument and the reasons that his motion is devoid of anything about the evidence that this is what really happened.

Their expert, as the plaintiff who is putting on the case against Mrs. Manning, didn't exist. I've got Walter Reed's testimony on my laptop, and I read through it this morning. And I can, if you want me to, take you through it.

THE COURT: I recollect it.

MR. PLATT: You know—

THE COURT: And I remember the ruling I regret making. I should not have sustained your objection to Mr. Fisher's question about the two-year delay. That was—I was wrong, given the way y'all tried the case after Mr. Reed left.

MR. PLATT: I'm sorry. I'm not with you on what you're talking about.

THE COURT: We'll come back to it, then. Go ahead.

MR. PLATT: Walter Reed at no time ever offered any testimony nor did Mr. Fisher attempt to elicit from him any evidence that he thought that Judy Manning's driving was responsible for the accident. Indeed, everything was pointing in the opposite direction involved—he said it a number of times—that the speed of the Toyota was low, and he affirmatively stated, and this is—

THE COURT: What did he say about those test drivers and why they didn't make that turn when they were doing the tests? Y'all know that as a fact much better than I. I only heard them from the stand. I didn't know all that y'all knew.

MR. PLATT: I'm sorry. I'm not sure.

THE COURT: There was something about the turn that she made that they testified to.

MR. PLATT: Lee Carr testified that anybody who tried to make that turn was going to go off the road across the median and have a wreck.

THE COURT: Okay.

MR. PLATT: Walter Reed testified just the opposite. Walter Reed testified—and this is on Page 188 of his testimony and a variety of other places, that if four brakes had been operative, there would have been no impact. Okay? In other words, the plaintiffs themselves affirmatively took the position that but for the brake failure, there would not have been an accident, the cars would not have impacted each other.

I took the opposite position. And I tried to say that the brakes were a non-issue. And Lee Carr argued that brakes or no brakes, there was going to be a wreck.

The plaintiffs, who had the responsibility of putting on a case against both defendants, did everything they could do to remove any reference to Mrs. Manning's driving. They argued affirmatively through their experts that there would not have been a wreck if the brakes hadn't failed. That's what the jury heard. The jury went into the jury room with the following dilemma in their minds. They had heard the plaintiff's attorney argue that there would have been no wreck, except for the brake failure. The jury, then, went into the jury room, and they had to decide was there a brake failure or not.

Once they decided there was no brake failure, there was no evidence left to find against Mrs. Manning. And here's why. There was absolute coalescence between the testimony of Mr. Carr and Mr. Reed on the fact that no one knew why Mrs. Manning was on the right side of the road.

THE COURT: Why she was off the road side and then made that hard turn?

MR. PLATT: That's right. There were no eyewitnesses. There was no one who said that Mrs. Manning was over there because she went to sleep or anything else. Only thing nobody could ever say was it may have been inattention. There was no evidence about why she made the hard left turn; only that she indeed made it. All of the evidence was, by both sides, on the experts, is, "We don't know why she was there. We don't know what got her there. We don't know why she had to make this abrupt left turn. We just know she made it."

And then the argument was: They said there was a brake failure. And then starting at that point, that the brake failure, because of the Toyota pickup truck defect, caused the wreck. We said there was no brake failure.

THE COURT: Let me ask Mr. Gilpin a law question. It's because of that that there was no sudden emergency requested—nobody requested sudden emergency because there was no evidence.

MR. GILPIN: Sudden emergency, as I understand it, would be—

THE COURT: Or any of the other.

MR. GILPIN:—an aid, but I don't know that it is sine qua non for the jury's admission.

The COURT: But I couldn't submit it, could I?

MR. GILPIN: You wouldn't submit an issue.

THE COURT: No, I mean an instruction.

MR. GILPIN: I don't know that it would be error to have that instruction. I don't know that it's error without it. I just—it's an aid the jury's consideration of the issues, but I don't think it would cut one way or the other, really, on our consideration here or even on appeal.

THE COURT: Okay. Didn't mean to cut you off, but I wasn't going to ask that you question.

MR. PLATT: I appreciate that, I evidenced before my problem understanding Texas law.

But in response to that, I think your Honor is correct. I mean, the reality of it was, there wasn't any argument presented as to Mrs. Manning. It is not an accident that Mr. King's involvement in the trial on a daily basis was minimal. There was nothing to do. There was no evidence presented.

THE COURT: Well, he's got a low exposure. His client, is deceased. He's in a spot with the estate. I mean, I heard that settlement, and then went down and met y'all down stairs and picked up that jury. Okay? I mean it was—I got on—I figured it out when I heard the settlement and then I walked down there and heard the voir dire. It was pretty evident to me the situation that Mrs. Manning's counsel was in. And I think all the lawyers appreciated that position.

MR. PLATT: I'm not being critical. I'm saying indeed there wasn't a defense to present.

THE COURT: Surprising to me that the jury called Mr. King brain damaged, a little unusual to have a jury call a lawyer brain damaged.

MR. PLATT: I wasn't privy to that.

THE COURT: Well, evidently the jury created nicknames for all of you. Sheriff will—I don't even know what they all were, but anyway, unusual. I could only—you know, at the time, I mean, I just—I knew why Mr. King was setting back not saying anything. I mean, it was—the case was against Toyota. That was the target defendant. I understand target defendants. The lawyers understood target defendants. The juries I don't know that are required to understand target defendants. And I certainly don't support the jury's view of Mr. King's ability or his position in this lawsuit. I think he did exactly what he was required to do to in this lawsuit.

MR. PLATT: I think, your Honor, really is the point. What happens in this courtroom and what happens in every trial is: You have in this courtroom two of the finest attorneys in the state, if not in the entire country, who represented the plaintiffs in a case where all of us, as you say, recognized what the realities are and the jury didn't know about insurance, the jury didn't know about these things, but the reality is that there was no point in obtaining a verdict against Mrs. Manning. It was not beneficial.

THE COURT: I assume policy limits had been long tendered and refused.

MR. PLATT: Beats me.

THE COURT: I'm sure. I'm not even going to ask him to tell me. I assume the insurance company is no fool.

MR. PLATT: When you get into that situation and you're a plaintiff's attorney and you recognize it, and in order to achieve any kind of a result for your client, you must hit Toyota. You bet. You've got to make some decisions. And there was an intelligence decision made, and if I were the lawyer, I would probably make the

same one. If I was going to load the gun against Toyota, no matter what I had to do against Mrs. Manning. That's the way the case got tried.

What the jury did is perfectly rational knowing what they had to work with. And it's only among us lawyers who later on look at it and say, "Well, you know, can we craft something from a result of this verdict."

THE COURT: I'll tell you, I was sick when I read the verdict if y'all didn't see it. I mean, they could have saved me a whole lot of problems by just saying Manning yes, Toyota no. Okay? And I'm only here today because they didn't.

MR. PLATT: I understand, but that is, your Honor—

THE COURT: I was sick. If y'all weren't sick, I was sick. I didn't sleep for two or three days afterwards.

MR. PLATT: Once they said Manning yes—

THE COURT: I didn't say that loud enough to be quoted.

MR. PLATT: —what would it have done?

THE COURT: Let me sleep.

MR. PLATT: But it wouldn't have achieved any more justice than we have here today.

THE COURT: Results matter to y'all, not me. Sleep matters to me. But, you know, the fact that you sit there and go "Goodness gracious, these people as to one party—and what, I mean, the question I had to the point that I went back and looked up the cases myself within two or three days of your jury verdict was: What do I do if I have a verdict that just goes whizzing by you as to one party, but on the other one is perfectly reasonable outcome given the evidence? What do I do? I haven't figured it out yet. If I had, I wouldn't have drug you guys down here to talk to me about it. But I'll tell you, y'all have a right to know that that hit me like a ton of bricks when I read it to the point that I went back and looked. I couldn't find anything. Y'all find anything, tell me. I've got a cursory library and I didn't spend a lot of time. Spent a lot of sleepless hours. But didn't spend any time.

MR. PLATT: Your Honor, I guess my problem with the agony that you're experiencing is that I think that in reality that the decision that led to the verdict in favor of Mrs. Manning was a knowing intelligent decision by plaintiff's attorney who understood what the objective was, and, you know—

THE COURT: So you think it was a result of the trial tactic?

MR. PLATT: That's the way the case was presented to the jury. I mean, there wasn't any evidence, except me saying Mrs. Manning was driving—you know the only evidence in the entire record, and that's the only reason that I was even able to argue it in closing argument is Officer Fulce said that he didn't think it was right to be traveling 50 miles an hour on a wet road. That is it. There isn't anybody—

THE COURT: Who was the expert who had the views 1 through 10?

MR. PLATT: Run that one by again.

THE COURT: There were these things that kept been showed on the TV, and somebody had 1 through 10.

MR. PLATT: That's Mr. Read.

THE COURT: He's the fellow from Austin. He's the plaintiff's expert?

MR. FISHER: Yes.

MR. PLATT: So, your Honor. I don't want to take more of your time. That sort of summarizes it.

THE COURT: I summarized for you my position, too, and I still don't know. We're talking about you. What do you want to say?

MR. KING: Your Honor, first of all, I appreciate you waiting, and I apologize.

THE COURT: These are the guys that had to wait. I had something else to work on that I just went back and worked on. And made y'all wait until I finished that.

MR. KING: I think I can be fairly brief. My response is fairly brief. I think I agree with what Mr. Platt just said. I don't think there is any evidence in the

record that would suggest that Judy Manning was negligent. The evidence that was presented to the jury was that what she did under the circumstances, once she got in the emergency situation, were what you would expect a driver to do in those circumstances, which is not a deviation from ordinary care. We don't have any evidence as to why she got there.

And I think, you know, candidly I talked to a couple of the juries, and that's exactly what they told me. Obviously, whatever I did didn't have any impact on the jury.

THE COURT: For sure.

MR. KING: So, you know, it wasn't some persuasive statement that I made.

THE COURT: But you were hiding out the whole trial. In lawyer parlance, you were hiding out.

MR. KING: That's true.

THE COURT: And we all knew it.

MR. KING: And the question was was the evidence going to be too. The evidence, I don't think, was there. And as to my client. I certainly argued Toyota was at fault because that's what the evidence suggested to me. Also, it seemed to me that was the logical strategy for me to employ in the case.

THE COURT: I mean, I think it was the foreman that made, I've forgotten who made that statement, but, obviously, whatever it was you did, worked for your client, because you ended up with a result that surprised most everybody in the courtroom; may not have surprised everybody. Surprised the Court anyway. Kind of took me back to read "no" "no." I expected to read "yes" and the other one is what I was looking to see what they were going to do.

MR. KING: Your Honor, you know, my view is that I can't say that the verdict was a shock to me at all. I was going to accept the verdict either way, and I thought that—if the verdict went either way, whatever way it went, it would be supported by the jury's—it may

be supported by the evidence. Certainly, this is a tragic accident. It's an unusual accident. It's all those things, but there isn't—

THE COURT: That's what makes good lawsuits.

MR. KING: There isn't any evidence that said that Judy Manning was negligent before she made this left-hand turn or that put her—you know, that established negligence on her part. For that reason, I think the verdict is supported by the evidence, and the Court's judgment based on that verdict is correct and shouldn't be set aside.

THE COURT: Can you—if the Court feels that a verdict is against the greater weight and preponderance of the evidence, can new trial be granted as to one party and not both?

MR. KING: No, your Honor, I don't believe so.

MR. FISHER: Your Honor—

THE COURT: We'll come back.

MR. FISHER: I don't want to rehash the same thing, but the question, even though from a trial tactic standpoint, we didn't have to say a lot about Judy Manning. We knew that Toyota was going to be talking about Judy Manning the entire trial, and that's exactly what they did. That's basically all we heard from them, is the irresponsible, you know, sudden severe left turn; woman who was traveling too fast. And pointed out correctly, and I certainly didn't rebutt it, that the experts and the police officers, with no contrary evidence, said that the lady was traveling too fast, regardless of why she was on the shoulder or whatever, that for those conditions. Our reconstruction, Dr. Read testified that her speed was about 50 to 55 miles an hour when she was actually out on the shoulder of the road under those conditions.

THE COURT: Was it the lawyers that told me or did I hear from the stand or did I—I mean, I don't know if it was experts or lawyers in front or not in front of the jury, that none of the stunt drivers would recreate

what she did because she wouldn't make that turn. I think the lawyers probably told me that.

MR. PLATT: Mr. Carr testified to that.

MR. FISHER: Mr. Carr testified said that to the jury.

THE COURT: I knew I heard somebody say that. I didn't know of it was—I figured it was y'all, but it was from Mr. Carr's opinion.

MR. PLATT: That's correct.

MR. FISHER: That's right. And I don't think if a sudden emergency or unavoidable accident instruction, inferential rebuttal though it now may be, had been tendered by the Court that was to raised by the evidence.

THE COURT: Well, that's what they found, wasn't it?

MR. FISHER: In essence, without any instruction from the Court, I suppose that's right, because it was not—I don't think the Court would have submitted—

THE COURT: It can't be unavoidable—well, I don't know, may it could be an unavoidable accident. I mean sudden emergency is what I always thought. Everybody kept saying there was no evidence of sudden emergency, but obviously something happened.

MR. FISHER: You have a car that goes out of control, goes across the—enters other lanes of traffic, which is negligence, per se, in itself.

THE COURT: For getting off the road that nobody knows what happened.

MR. FISHER: Yes, ma'am.

THE COURT: There is a dispute as to what happened. We know what her car did. There is dispute as to what that indicates when she came back onto the road.

MR. FISHER: What I'm suggesting to the Court, your Honor, is that that constitutes negligence, per se, in itself. I mean to go across the road, enter another—go across the median, enter the opposite lane of traffic constitutes in and of itself negligence, per se. Now, that

may be rebutted by offer of evidence about such things as, well, there was a car that stopped suddenly in front of the lady; there was a tire that fell off of a pickup and she veered—

THE COURT: Somebody changed lanes in front of her. Something like that.

MR. FISHER: That's exactly right.

THE COURT: And, of course, the lane changer would be long gone and nobody would know, unless somebody was watching.

MR. FISHER: But such evidence would, in fact, take you out of a negligence, per se, situation and put you back into an ordinary negligence situation with then the propriety then of a sudden emergency issue which would certainly be a different question. That was not our case here whatsoever. There was not a shread of evidence to that effect.

And the jury just goes out and says, "Well, we're going to just no, no, no, no." And it is against the overwhelming weight. And I don't see how we can grant a new trial as to one and not both, your Honor, and I plead with the Court to do that.

Could Mr. Donnell just—

THE COURT: Sure. I want to hear from anybody that's got a comment.

MR. DONNELL: One of the points your Honor made, and which I totally agree with, and this Court has tried numerous cases but I think one of the things that impacted upon Walter Read's testimony to the jury and the testimony of Alpha Engineering was the issue as to why there were time delays and certain things being done throughout the course of this trial.

And the Court mentioned it and I couldn't agree with you more, that very early in the case, when we attempted to introduce why there was delay in certain things being done, we were told by Toyota that there would be no issue in this case as to the time sequences over which events occurred, the time factor. With that assurance, the Court

did not let us offer evidence from Dr. Read as to why certain things were not done.

And as the Court knows from off-the-record discussion, his wife was dying of lukemia during the period of time that this case was sitting in his office; however, thereafter when Dr. Reed left the stand, there were continued emphasis, references and points made as to the time sequences and time delays that occurred in which this brake cylinder was examined.

And it's one of those things that the Court has to bring to her own mind and recall how it was done. And we think it did create a problem. It created a problem with the plaintiff, and we think it created unfair problems to the plaintiff, and I would like to recall to the Court that dilemma that the plaintiffs were in, which we really had no way to control.

MR. PLATT: Let me just say, that doesn't come up in something that know, since it was never briefed and never raised and now it comes up in rebuttal in closing argument, conclusion of the argument. Let me say to your Honor, that there is a whole bunch of things that happened in that case about the delays, don't have thing in the world to do with Mr. Read's health. They have to do with the system. So if we want to start down that road, I'm more than willing to go back in and argue it fully, but to stand up now and want to somehow, you know, this is all the cause of this, is not correct. And it also takes away from us the opportunity to respond. So if you have any question about that, I would be more than happy to brief it.

THE COURT: I will be glad. I mean I raised it, because, I mean, y'all knew that when all of a sudden the delay came back in and I realized I had ruled wrong, I raised it at the time of trial. If I didn't make that clear at the time of trial, maybe it was just in my mind, and I didn't make it clear enough for the lawyers.

MR. PLATT: That's—

THE COURT: But I should not—and I don't know that that's reversable error.

MR. PLATT: Any that's my point. I don't think you did rule wrong. It was brought up a lot. And if the plaintiff's counsel thought they wanted to reopen that whole little issue, they knew how to do it. It was never done. So I don't think it's done wrong. It's easy now three months later to somehow forget about a lot of things that went on. It wasn't Mr. Read's doing.

I do want to address your Honor's comment about whether or not you can order a new trial for one party and not the other. For the reasons that I have stated, I don't think there is any basis for a new trial as to any party. I really don't. But I frankly don't care as far as Mrs. Manning is concerned. That isn't my problem.

Under Rule 320, you can clearly grant a new trial when the new trial affects only part of the matters in controversy. And it is separable without unfairness to the parties.

Now, as I understand the arguments that plaintiff's counsel is making today which is—

THE COURT: So, I appreciate you helping me find this standard. Tell me what you read that standard to be.

MR. PLATT: In Rule 320, your Honor, down in the second sentence, your Honor, it would appear to me—

THE COURT: Part of the matters in controversy.

MR. PLATT: Such parties are clearly separable without unfairness to the parties.

THE COURT: I just couldn't find any case law on that. You know, they just throw that little language in these and then I go start trying to figure out what it means on my own, I admit, and that's why I raised it to y'all because I was looking at that. Y'all didn't in your—what I had before me, but I did. That's why I wanted to raise it to you.

MR. PLATT: It would be my argument on that for your Honor's consideration, as we talked about, and I

don't want to belabor the fact, there was no question that as between the plaintiff and Toyota, this was case was fully and fairly tried. It was hotly debated and contested from the get go and argued on both sides. And it can be summarized to say that the jury's verdict in this case turned on the credibility of Mr. Carr and Mr. Read, the two experts, which one they chose to believe.

There is no basis for the conclusion that if the plaintiffs got an unfair trial against Mrs. Manning, which I don't believe they did, but if your Honor were to conclude that they got an unfair trial against Mrs. Manning and that they should be allowed to put on the best case they can against Mrs. Manning to show that this lady's getting on the right shoulder, in the first place, or her steering—

(Interruption in proceedings)

THE COURT: I apologize. Do you remember—go back and pick up where you are and share that thought, because we are talking about whether or not the party knows.

MR. PLATT: Let me sort of summarize and then Mr. Gilpin, I think, wants to address the Court on something that he probably knows more about that than I do.

The point I'm making, I guess, is this: It's obvious to everybody that the case was fairly and completely and fully tried against Toyota. And that without arguing for one moment that no jury in this world could have ruled the other way, it is equally facetious to argue that juries necessarily would have to rule in favor of the plaintiff. Can't get there from here.

THE COURT: Cannot.

MR. PLATT: It would be almost—when you start talking about basic fairness, when you understand what happened, the plaintiffs chose for legitimate business reasons to structure this lawsuit in a way that would put the strongest possible case on against Toyota, even if it meant gutting the potential case against the Mannings.

If this Court were to conclude that the plaintiffs in choosing to try the case that way, coming in and trying a lawsuit and clearly losing against Toyota, after having made the best shot they could, that they can get another shot at Toyota because they get a shot at Manning, as your Honor said at the beginning, if this had been plaintiffs versus Toyota, there would be no basis for the argument they have made.

THE COURT: There would be no evidence of a possible problem with the argument that they made.

MR. PLATT: That's right. So what they have done, if they get a new trial against Toyota, is they have used their strategy decision to strip the case out against the Mannings. They now get a shot at the only party they care about, Toyota. Indeed, your Honor knows as you sit here, that if you enter an order granting a new trial against the Manning, it will never take place. Because the fact of the matter is, there isn't any money there. That's why this case got tried the way it did in the first place. This is nothing more than a backdoor attempt to get another run at Toyota by arguing that they should have gotten a verdict against the Mannings. That is unfair. That does segway, if you will, into the Texas cases they do say that the purpose for a Motion for New Trial is not to let trial counsel try to reorganize the trial strategy and make a run at it a different way than they chose to the first time.

THE COURT: As I understand their argument, what they are saying is that there is something seriously wrong in this case, and you can see it by looking at what the jury did with Mrs. Manning.

MR. PLATT: And you couldn't buy that if it weren't true that they had deliberately set it up to happen that way. This was not an accident. You can start with—

THE COURT: I made it very clear that I understood the trial strategy involved.

MR. PLATT: Mr. Fisher in opening statement on Page 17 tried, as Mr. King just mentioned, he's the one who said Mrs. Manning was in an emergency situa-

tion. He read to you a portion of the stuff I've quoted in my papers. He left off the last sentence. The last sentence of what he just read to you in his argument goes on to say, "I plead with you from the evidence to hold Toyota at least, you know, to at least 50 percent or more with respect to the issue, because if your answer is that this is 100 percent Judy Manning's fault, I just don't believe that's supported by the evidence in the case."

That's plaintiff's counsel closing argument. For him to now tell you that he thinks it's wrong for Judy Manning to have been turned loose, is totally inconsistent with all of the position they took during trial and all of the evidence.

THE COURT: I thought the context of that was is that if Manning was at fault you can't hold her a hundred percent, because we thing that those brakes contributed to sending her across the median.

MR. PLATT: I have no problem with that, if there had been any evidence of it. Walter Reed went on the stand and had the chance, if he wanted to do so, to say that there was something about Judy Manning's driving that might have contributed to cause this accident. They went the other way. Their expert said Judy Manning never did anything wrong.

THE COURT: If the defense had presented no defense at the end of the plaintiff's case, would there have been evidence to support a negligence finding against Mrs. Manning?

MR. PLATT: There was not. And I was joking with Mr. King, "Did you ever hear a motion for a DV for the Manning?" There wasn't a motion made, your Honor. This thing was rigged from the beginning, not in a bad sense, in a legitimate legal sense. They went for Toyota, as you said, because they weren't going to take his policy limits. Now they are back here saying to your Honor, "okay. It didn't quite work out. Now let's try one more time to see if we can use the Mannings as the vehicle to get to Toyota." When they set it up that way, there

wasn't even a motion for a DV. It was clear from the beginning of the trial that the fix was in. It was to try to go Toyota, and nobody else cared about anything.

Now, if they were arguing that Toyota was in a position where the evidence could support the verdict, now I can get sort of excited about this motion, but this is really outrageous to say because when you decide not to try a case against the Manning, because the Manning didn't move for a DV because they put on no evidence against the Mannings, and low and behold, the jury did what you expect the jury to do, which is say, "Well, what's the basis for holding the Mannings responsible?"

Now they are back saying, "Not only do we want a new trial against Mrs. Manning, but your Honor, you can't possibly give the trial against the Mannings without giving one against Toyota.

THE COURT: I'm not sure the lawyers talked about that issue to me, and that's why I raised it.

MR. PLATT: Mr. Fisher did, unless I misheard.

THE COURT: He did because I raised it. Okay? Mr. Gilpin gave you the rule book, and y'all found the appropriate rule. And I just couldn't find any authority on the point. And I think the rule's pretty clear. That's probably why there's not any authority, probably nobody has ever been faced with what I'm faced with before. But I do want to hear Mr. Gilpin on Texas law.

MR. GILPIN: I was hopefully going to address the sudden emergency issue.

THE COURT: You agree, also, that nobody requested that instruction?

MR. GILPIN: I do. I think if a sudden emergency issue had been requested and granted—

THE COURT: I have a problem.

MR. GILPIN: —and we had our result here, the complaint would be by the plaintiffs it was a comment, but it was too strong or suggested an answer that would exonerate someone. I think the fact that there was no submission of sudden emergency and a failure to find

negligence on either party takes sudden emergency—it's not—it certainly can't be an error not to have it in the court's charge.

THE COURT: Because we could conclude that the jury just did that out of common sense.

MR. GILPIN: Right. They were not guided to consideration of emergency by anything other than the evidence.

THE COURT: So what the defendants point out is that there are the—plaintiff feels that a result—that was surprising to counsel, and I'll admit surprising to the Court, with regard to one defendant, the defendants' position that that is totally justified by the evidence and the trial tactics of the plaintiffs in the case.

MR. GILPIN: I think there is that, and then there is a case that Mr. Terry was going to rely on had he not settled and gone away. That spoke in terms—

THE COURT: Which was the Manning estate, correct?

MR. GILPIN: Yeah. Talks about a presumptions of due care under the old Boass versus White of due care on the part of the deceased. So we're looking at an unexplained presence on a shoulder, no evidence, nobody could come up with any evidence, but she's there. And what she does after that is described in many ways by Dr. Reed as the use of ordinary care or what a person would have done under those circumstances.

THE COURT: What she did was something that the experts, I thought said, that no stunt driver would duplicate.

MR. FISHER: Exactly.

MR. GILPIN: One expert said that, but Dr. Reed was not that critical of her in what she did.

MR. PLATT: What the expert said, which is true, is that no one can pull it off. I mean, we all have to do things somebody just can't do.

THE COURT: That's right.

MR. PLATT: You can't make that turn on that road in that vehicle without going off the road and having a wreck.

THE COURT: Without doing what happened.

MR. PLATT: Doesn't mean—I mean, let me ask you something. And this is in response to Mr. Fisher's argument where he says there is a prima facie case of negligence, negligence, per se. If a driver in Texas is driving down the road and without any question has a fatal instantaneous heart attack, and takes out a school bus full of children, and that's the evidence, period, is there any evidence of negligence?

MR. FISHER: May I answer that, your Honor?

THE COURT: You can.

MR. PLATT: See, that's problem is that it is not true that every time there is a wreck that there is evidence of negligence. We all start to thinking like that when all we do is try lawsuits.

THE COURT: You may not do medical malpractice cases, but medical malpractice cases that comes up all the time.

MR. PLATT: That's right, it does.

THE COURT: That's where I see it. Bad results happen because of people's physical condition when presented to medical personnel.

MR. PLATT: That's right. And when you know if Mr. Reed had chosen to, he probably could have come up with some kind of an argument on submissible negligence against Mrs. Manning. The fact of the matter is, they chose not to. And the reason everybody is sort of surprised about the verdict is, you would have to be sort of inhuman and not of this world not to think that this is just sort of unfair and not too nice that this nice lady who's hurt in this automobile accident, isn't her fault, doesn't get a verdict against anybody. If Toyota wasn't in this case at all, there had been no case against Toyota, and if the evidence had been exactly what it was against Mrs. Manning, the result probably might have been the

same. I mean, there was no evidence that Mrs. Manning did anything wrong. And no one wanted to make the argument.

THE COURT: Mrs. Manning.

MR. KING: One thing I would point out to the Court, I think, is the rule that they have talked about, and obviously the question about no unfairness to the parties, I think, is the important issue here, is if the Court was to grant a new trial only as to the estate of Judy Manning and not as to Toyota, the Court would be operating as a matter of law and depriving my client of its right to contribution to submit the fault of another tort feasor. This is not a separate controversy like you may have in a business case or contract case. We've you've got two different situations. My client, if the Court was to grant a new trial as to my client, the Court would be depriving my client of its right to contribution under Texas law.

THE COURT: We use general charges now for good reason. We don't want people picking apart jury verdicts. God, I just spent four days trying to figure out how to do one. Right or wrong. I don't know. I mean, I wish a libel was in the pattern jury charge. I think there is a reason there is not. I just learned why. Okay?

But I got a general charge, which is was appropriate and required under the circumstances, which said your client by a preponderance of the evidence was not negligent, couldn't be a proximate cause, maybe it could be proximate cause. I hadn't thought about that. But we don't know what the jury would have done. The plaintiffs say that the result wasn't fair when you look at it.

(Phone interruption.)

MR. KING: I think your Honor was commenting, when the phone call came, about the charge and the fact that it was a general charge. And certainly that's correct, and we didn't object to it.

THE COURT: Only proper charge in the circumstances.

MR. KING: I don't disagree with that at all. My point is and the only point I was making is very simple: I think if you—this is not a controversy where the question of Toyota's fault is separable. It's not separable. Because my defense in the case, quite obviously, as I—whether it was persuasive or eloquent or whatever it was or wasn't was that this accident happened, and one explanation for why it happened was because these brakes didn't work. That was my position at trial, and I don't have—I'm not saying it wasn't my position at trial, because it was. That's the reason I didn't ask for an instruction on unavoidable accident or sudden emergency.

THE COURT: How do you explain the two different position?

MR. KING: I can't take two different position. That's my position. And if you grant a new trial as to my client, Judge, you have to grant a new trial to Toyota. It's my position you shouldn't grant a new trial, because I don't think there is evidence.

THE COURT: But because of the rule that says point or points which affect only part of the matters in controversy, I had not, and you are right to point out to me, you have a contribution suit on file.

MR. KING: That's correct.

THE COURT: This is pre-tort reform.

MR. KING: Yes, your Honor.

MR. GILPIN: May I address that narrow point?

THE COURT: I sure need you to when he's through.

MR. KING: Obviously, the part of the rule that modified that is "and that such party—"

(Off record discussion)

MR. KING: Now, Mr. King, you get to continue. Back on the record.

MR. KING: Your Honor, I feel somewhat like the rag doll between two competing parties. They keep pulling me one way or the other. It is my position that the Court shouldn't grant the Motion For New Trial. How-

ever, if the Court is going to grant the Motion For New Trial, it is my position that it has to be granted for both parties, and, in particular, because under Rule 320 it says that you can only grant it as to part, if that such part is clearly separable without unfairness to the parties. And in this particular instance, in this particular case, and under Texas law, I have a right to contribution. I have that right. And I don't think you can separate it. Because I can't ever--even under Texas law make that claim anywhere else, except in this case. And if you don't grant a new trial as to them, they are going to come in and say, "res judicata, it's barred."

THE COURT: You can bring a lawsuit for contribution in the future, but not if there is a judgment already in effect as to that party.

MR. KING: That's correct, your Honor. I think under Texas law I have to bring the claim for contribution within the same suit I'm in.

THE COURT: I've had a contribution lawsuit. And you may be correct in circumstances of this case, but in a different circumstances, I had the unusual situation of trying only a contribution suit.

MR. KING: I think since the advent of Duncan versus Cessna and the prodigy of cases that follow under that, I have to try the contribution claim in this case.

THE COURT: It was most probably in that other case, because it was seeking contribution from an arbitration award under a maritime agreement. That was such an unusual circumstance, I couldn't find anybody that ever heard of such. So I knew that was unique at the time I had to try that case.

MR. KING: Basically, I think that concludes everything I have to say.

THE COURT: Mr. Gilpin?

MR. GILPIN: With regard—I think it's clearly separable, and wouldn't be unfair to the parties. The big reason being that Mr. King has had his trial for contribution. We have agreed that the plaintiff probably got a fair trial as to Toyota. There is absolutely no reason

with pleadings on file, with the ability to call witnesses, and every other thing that's in stock that Mr. King did not have exactly the same right; indeed, he did, have his contribution trial at the same time.

THE COURT: Let met just—I'm not agreeing with anybody as to anybody having fair and not fair. Understand that.

MR. GILPIN: Fine.

THE COURT: Just understand that my position absolutely is that the result with regard to Toyota was a result that everyone expected might be the result of the jury trial. It's only, I think, as to the result to Mr. King's client that gives the plaintiff the leg to come in and argue, "Hey, whatever went on in this trial was manifestly unjust." And I assume that's the burden that—they have assumed that burden in their motion, and I assume that's what they're arguing. I think we're quibbling over something that's probably we don't need to quibble over, but I just wanted to make sure it's clear.

MR. GILPIN: If, however, the nonseparability issue is that I need a right to a trial for contribution and indemnity, he's had that or contribution. He's certainly had that. Just as much as the plaintiff had their trial against us, so did he. There was pleadings, witnesses, everything.

THE COURT: He doesn't need a new trial for contribution because he doesn't need any contribution because the jury found him not liable. It's only if the jury—

MR. GILPIN: If the Court were to sever it out and say he gets a new trial, because we have this visceral reaction that maybe Mrs. Manning did something wrong, that's still doesn't mean that we have to go through that again simply because he has a contribution claim. We've had that trial.

THE COURT: Okay.

MR. KING: I think I've said it.

THE COURT: Mr. Fisher anything?

MR. FISHER: Only just simply to observe, your Honor, that if the jury—if the jury's verdict is wrong, if it's manifestly unjust because it is against the greater weight and preponderance of the evidence, it just seems to me that under Rule 320 that the claim for contributions that the claim—that it speaks to the whole jury process here of whether or not there was unfairness in the verdict demonstrated. It's hard to compartmenalize. Toyota would say, "Well, if there is any unfairness here, it's only over here on this limited area. Now, over here it was imminently fair to do thus and so."

I'm just saying that if unfairness is demonstrated, it permeates the verdict. And Rule 320, which does say that unless such parties are clearly separable without unfairness to the party, if a new trial is granted as to the Manning defendant, which I think should be done, I believe that it's essential that the case be retried as to both parties. And that's all I have to say.

THE COURT: Wouldn't you agree there has to be something that went on that would also have to be an unfair trial as to Toyota if you're claiming that there was an unfair result as to the Mannings?

MR. FISHER: I think that with respect to the—if you have a jury that demonstrates that it does not follow the evidence with respect to, let's say, the Manning defendant, I don't think that you can—it seems to me that the Court, in its inherent power, has the right to say that, you know, that I can't necessarily say that some of the very same process that was working back there to bring about that unfair result in part A, didn't necessarily, as a matter of law, spill over and effect their answers over here to part B. I mean simply because there is some evidence, some more evidence of liability as to Toyota, as I see it, doesn't—you know, it's certainly inherently within the power of the Court to say, you know, that I as the judge cannot say that the unfairness is strictly and solely limited here to Mr. King's client and

that over here with respect to Toyota, these people did everything, they evaluated this in the spirit and under the instructions that the Court gave, and so when they said "no" over here, that was all done in accordance."

They have demonstrated in this other answer, as I see it, such a degree of unfairness that it—that the Court is justified—and the Court has the discretion to do whatever your Honor feels is basically fair, but I do feel that when this Equitable Life insurance versus Murdock, which talked about the trial judge being in the best position to judge the effect, the results of the trial, the demeanor and conduct during trial, all of these things from the sandbagging instance to telling us about, "No, we—you don't need to offer any such evidence from Dr. Reed because we're not making delay an issue in the case." And it turns out to be repeatedly over and over and over and over again.

And I'm just saying to you, your Honor, I don't know how you—you know, I can't say to the court that I know for a fact that's why the jury did what it did, but it's the sort of thing that I feel—

THE COURT: We are not going to invade the mental processes of the jury.

MR. FISHER: I understand. And I'm not attempting to do. That's why I didn't load up my motion with a lot of those things, because that would invade the province, you know, of the mental processes of the jury.

But I do feel that substantial justice was not done here, and I think the Court in its inherent power can and we ask the Court to grant an entire Motion For New Trial, including the issues of contribution and the other various other issues. This business of somebody having a heart attack, this is an important point, because with respect to negligence per se or statutory negligence in going across a median, entering another lane of traffic, he observes, and I know this is rather elementary, that, well, there might have been a heart attack that escused it. That's true. And when there is evidence of a heart

attack, then you've got the justification for giving the instruction of sudden emergency and so forth. There was no comparable example like that in this case.

Thank you.

THE COURT: Let me think about it. I appreciate everybody's time on this. When is the seventy-fifth day? The clerk has calculated it, and she got in the computer. Let see if we all agree with her.

MR. GILPIN: October 1 was the date of the signing of the judgment.

THE COURT: So that's 31, 30, 31. That's too many.

The 16th? The clerk thinks it's the 16th. That's probably about right. It would be 61 to the 1st; 61 minus 75 comes out 14. I will bet the 14th is a weekend.

MR. KING: 14th is Saturday, your Honor.

THE COURT: Meg figured Monday. I think she figured right.

MR. PLATT: December 17th?

THE COURT: Which the 15th is a Sunday, so it goes to the next day. I will rule by Friday. I won't even worry about having to worry about weekend.

MR. FISHER: Thank you, Judge. And I will rule. I won't let it go by operation of law. Thank you.

THE STATE OF TEXAS

COUNTY OF HARRIS

I, Scotty G. Baldwin, Deputy Official Court Reporter in and for the 127th District Court of Harris County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all proceedings directed by counsel to be included in the statement of facts in the above styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

WITNESS my hand this the 3rd day of February, 1992.

SCOTTY G. BALDWIN
Court Reporter

Certificate No. 1019
Expiration: 12/31/93
301 Fannin, 6th Floor
Houston, Texas 77002
(713) 221-6274

APPENDIX E

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
127TH JUDICIAL DISTRICT

No. 86-35520

M. JACK HENRY and JANET HENRY, Individually, and M. JACK HENRY, Guardian of the Person and Estate of Karen Henry

v.

TOYOTA MOTOR COMPANY, TOYOTA MOTOR SALES, U.S.A., INC., GULF STATES TOYOTA, INC., TOYOTA SOUTH, INC., TOYOTA AUTOBODY, INC. OF CALIFORNIA, f/k/a TOYOTA MOTOR MANUFACTURING, U.S.A., INC., and RON MANNING, as Representative of the Estate of Judy Nelson Manning

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MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Jack and Janet Henry, individually and as Guardian of the Person and Estate of Karen Henry, and, pursuant to Rule 320 of the Texas Rules of Civil Procedure, file this motion for new trial and show as follows:

I.

Introduction

The jury's verdict in this case was unjust, unfair, and contrary to the overwhelming evidence. Since this Court had the unique opportunity to hear the evidence, observe the demeanor and conduct of the witnesses, and to note

all incidents that influenced the jury, this Court is the best qualified officer of this state to determine whether or not the Henrys received a fair trial and whether substantial justice was done. *See Equitable Life Assurance Society of the United States v. Murdock*, 219 S.W.2d 159, 164-65 (Tex. Civ. App.-El. Paso 1949, writ ref'd n.r.e.).

The Henrys now submit that this Court must grant a new trial in the interests of justice and fairness.

Karen Henry was deprived of any meaningful existence by *either* the negligence of Judy Manning or the negligence or product defect of Toyota. Of that, there can be no dispute.

Karen Henry was driving her car along the highway on June 11, 1985, when Mrs. Manning's Toyota pickup truck swerved from its lane of traffic, crossed the median, and collided with Ms. Henry's car, causing tragic injuries. The fault lay with either or both of the Defendants. No evidence suggested that Karen Henry was in any manner at fault in this incident. No evidence suggested that any person other than the Defendants could be at fault. No reasonable, fair, and just juror could believe that neither Judy Manning nor Toyota was at fault.

Nonetheless, the jury answered "No" to questions 1 and 2a and 2b, and thereby absolved Mrs. Manning and Toyota from all responsibility for the destruction of Karen Henry's life.

The jury's verdict could not have been motivated by traditional concepts of justice. No justice is served by the verdict. The Defendants' fault caused this accident and justice demands that they be required to answer for that fault.

When a trial court has witnessed such a marked injustice, the trial court *must* intervene in order to preserve the integrity of the judicial system.

II.

1. *The Court Has Unfettered Discretion to Grant a New Trial in the Interests of Justice.*

Because the trial court is in the best position to determine whether the interests of fairness and justice have been served, Texas provides trial courts with unfettered discretion to grant a new trial. *See Champion International Corp. v. Twelfth Court of Appeals*, 762 S.W.2d 898, 899 (Tex. 1988); *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985); *Ingersoll-Rand Co. v. Harrington*, 805 S.W.2d 597, 601 (Tex. App.-Beaumont 1991, writ denied).

It is well settled that a trial court can grant a new trial solely in the interests of justice. *Equitable Life Assurance Society of the United States v. Murdock*, 219 S.W.2d at 164. Texas gives trial courts the inherent power to "liberally" exercise such discretion. *Id.* This liberal discretion is permitted because the trial judge "is better qualified to judge whether a fair trial has been had and substantial justice done than is the appellate court . . . ." *Id.*

To protect this discretion, Texas prohibits appellate challenges to a trial court's grant of new trial, either by mandamus or on appeal from a judgment in the second trial. *See Champion International Corp.*, 762 S.W.2d at 899 (mandamus); *Ingersoll-Rand Co.*, 805 S.W.2d at 600-01 (second trial).

Texas permits a trial court to grant a motion for new trial even if the motion does not set forth a sound ground for a new trial. *Brown v. American Finance Co.*, 432 S.W.2d 564, 567 (Tex. Civ. App.-Dallas 1968, writ ref'd n.r.e.). Further, Texas permits a trial court to grant a new trial on her own motion. *Id.* And, a trial court does not have to give her reasons for granting a new trial. *Id.*

Rule 320 of the Texas Rules of Civil Procedure provides that: "[n]ew trials may be granted and judgment set aside for good cause, on motion or on the court's own motion on such terms as the court shall direct."

As this Court is aware, there is certainly good cause to grant a new trial here, since the verdict reflects fundamental injustice. "If the court thinks that the ends of justice have not been attained by the verdict of the jury, it is clearly its duty to set aside the judgment rendered on the verdict." *Wichita Falls Tractor Co. v. Cook*, 60 S.W.2d 764, 768 (Tex. Comm. App. 1933, opinion adopted). The Henry's respectfully pray that this Court exercise her inherent power to grant a new trial in the interests of fairness and justice.

2. *The Court Should Grant a New Trial Since the Verdict Is So Against the Great Weight and Preponderance of the Evidence as to Be Manifestly Unjust.*

Not only is there good cause in equity to grant a new trial, but also there is good cause in law to grant a new trial.

In questions 1 and 2a and 2b, the jury was asked to find as a fact, as between Judy Manning and Toyota, who was responsible for Karen Henry's injuries. Despite overwhelming evidence that either one or both of the Defendants caused the occurrence, the jury refused to find either of the Defendants responsible.

The jury's failure to find either Defendant responsible can only be upheld if overwhelming evidence is disregarded. And, if the overwhelming evidence is disregarded, the verdict can only be understood as a product of prejudice, a decision by the jurors to ignore the evidence and to write a judgment rather than a verdict.

A jury's failure to find a fact need not be supported by any evidence, but the jury cannot refuse to find a fact in the face of overwhelming evidence of the existence of the fact. *Schmeltekopf v. Johnson Well Service of Luling*, 810 S.W.2d 865, 869 (Tex. App.-Austin 1991, no writ); *Russell v. Hankerson*, 771 S.W.2d 650, 653 (Tex. App.-Corpus Christi 1989, writ denied). A jury's verdict must be set aside where it is so against the great weight and preponderance of the evidence as to be man-

ifestly unjust. *In re King's Estate*, 150 Tex. 662, 224 S.W.2d 660 (1951); *Watson v. Prewitt*, 159 Tex. 305, 320 S.W.2d 815, 816 (1959); *see also Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986).

In the determination of whether a finding (or, as here, a failure to find) is against the great weight and preponderance of the evidence, the Court "must consider and weigh all the evidence, both the evidence which tends to prove the existence of a vital fact as well as evidence which tends to disprove its existence." *Russell*, 771 S.W. 2d at 652; *Cain v. Bain*, 709 S.W.2d 175, 196 (Tex. 1986). With this consideration, if a jury finding is so contrary to the great weight and preponderance of the evidence as to be manifestly unjust, the finding must be set aside and a new trial ordered, "regardless of whether there is some evidence to support it." *Russell*, 771 S.W. 2d at 652.

Here, there can be no doubt that the overwhelming evidence demonstrated that either Judy Manning or Toyota caused this accident. Karen Henry did not cause it. No other person caused it.

A similar situation confronted the Houston Court of Appeals in 1959. *Carrico v. Busby*, 325 S.W.2d 413 (Tex. Civ. App.-Houston 1959, writ ref'd n.r.e.). In that case, as here, the defendant drove his car into the plaintiff's car in broad daylight. *Id.* at 415. As the Court noted, "[t]here is nothing to account for the collision other than the negligence of the appellee in the particulars submitted in said issues." *Id.* Because the jury's failure to find negligence was so against the great weight and preponderance of the evidence as to be "manifestly wrong and unjust," the court of appeals affirmed the trial court's decision to set aside the jury's findings.

In the present case, there are only two factors that could account for the collision—either Toyota's product defect or negligence caused it or Mrs. Manning's negligence caused it. The jury's findings that neither party caused the collision are so against the great weight and

preponderance of the evidence as to be manifestly wrong and unjust. The Henry's respectfully request that this Court exercise the proper review over the jury's findings, set aside that verdict, and grant a new trial.

Conclusion

The Court witnessed this entire trial, observed all the witnesses, saw all the evidence, heard all the testimony, and *knows* whether the jury's verdict represents fairness and justice for the Henry family. The Court can exercise its discretion to grant a new trial in the interests of fairness and justice, and such decision can never be reviewed by any other court or questioned by the parties. This case presents a singular opportunity for the Court to exercise its inherent powers in the service of justice.

Plaintiffs respectfully request that the judgment based upon the jury's verdict be set aside and a new trial be granted.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing Motion for New Trial was forwarded either by hand delivery, return receipt requested, fax, or Federal Express to all counsel of record on this 31st day of October, 1991.

/s/ Wayne Fisher

DWH/jws
9826

APPENDIX F

TABLE 1

Cases Holding That A Trial Court's Decision To Grant Or Deny A New Trial Is Subject To Appellate Review For Abuse Of Discretion

1. **Federal—**
   Browning-Ferris Indus., Inc. v. *Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989); *Williamson* v. *Consolidated Rail Corp.*, 926 F.2d 1344, 1352-53 (3d Cir. 1991); *Ard* v. *Southwest Forest Indus.*, 849 F.2d 517, 520 (11th Cir. 1988); *McNeal* v. *Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637, 646 (D.C. Cir. 1988); *Venegas* v. *Wagner*, 831 F.2d 1514, 1519 (9th Cir. 1987)

2. **Alabama—**
   Talley v. *Kellogg Co.*, 546 So.2d 385, 388 (Ala. 1989); *Jawad* v. *Granade*, 497 So.2d 471, 477 (Ala. 1986)

3. **Alaska—**
   Trobough v. *French*, 803 P.2d 384, 385 (Alaska 1990)

4. **Arizona—**
   Tempe Corporate Office Bldg. v. *Arizona Funding Serv., Inc.*, 807 P.2d 1130, 1134 (Ariz. Ct. App. 1991)

5. **Arkansas—**
   Hamilton v. *Russell*, 821 S.W.2d 35, 36 (Ark. 1991)

6. **California—**
   Hobbs v. *Eichler*, 164 Cal. App. 3d 174, 192 (Cal. Ct. App. 1985); *Candido* v. *Huitt*, 151 Cal. App. 3d 918, 922 (Cal. Ct. App. 1984)

7. **Colorado—**
   In re Interest of P.N., 663 P.2d 253, 256 (Colo. 1983)

8. **Connecticut—**
   Wochek v. *Foley*, 477 A.2d 1015, 1018 (Conn. 1984)

9. **Delaware—**
   James v. *Glazer*, 570 A.2d 1150, 1156 (Del. 1990); *Storey* v. *Camper*, 401 A.2d 458, 465 (Del. 1979)

10. **District of Columbia—**
    Washington v. *A & H Garcias Trash Hauling Co.*, 584 A.2d 544, 545 (D.C. 1990)

11. **Florida—**
    Placido Gardens Condominium Ass'n v. *Johnson*, 563 So.2d 826, 828 (Fla. Dist. Ct. App. 1990); *Phar-Mor of Fla., Inc.* v. *Steuernagel*, 550 So.2d 548, 550 (Fla. Dist. Ct. App. 1989)

12. **Georgia—**
    Pierce v. *Gaskins*, 309 S.E.2d 658, 661 (Ga. Ct. App. 1983); *Hicks* v. *American Interstate Ins. Co.*, 279 S.E.2d 517, 521 (Ga. Ct. App. 1981)

13. **Hawaii—**
    Harkins v. *Ikeda*, 557 P.2d 788, 790 (Haw. 1976); *Stewart* v. *Brennan*, 748 P.2d 816, 823-24 (Haw. Ct. App. 1988)

14. **Idaho—**
    Burggraf v. *Chaffin*, 823 P.2d 775, 777 (Idaho 1991); *Quick* v. *Crane*, 727 P.2d 1187, 1198 (Idaho 1986)

15. **Illinois—**
    Marotta v. *General Motors Corp.*, 483 N.E.2d 503, 506-07 (Ill. 1985); *McKinney* v. *Coca Cola Bottling Co.*, 524 N.E.2d 657, 658 (Ill. App. 1988)

16. **Indiana—**
    Schuh v. *Silcox*, 581 N.E.2d 926, 927 (Ind. Ct. App. 1991); *Coffel* v. *Perry*, 452 N.E.2d 1066, 1068 (Ind. Ct. App. 1983)

17. **Iowa—**
Hardy v. *Britt-Tech Corp.*, 378 N.W.2d 307, 310 (Iowa Ct. App. 1985); *Miller* v. *AMF Harley-Davidson Motor Co.*, 328 N.W.2d 348, 351 (Iowa Ct. App. 1982)

18. **Kansas—**
Douglas v. *Lombardino*, 693 P.2d 1138, 1150 (Kan. 1985); *In re Acquisition of Property by Eminent Domain*, 690 P.2d 1375, 1378 (Kan. 1984)

19. **Kentucky—**
Pratt v. *Mountain Utils. Co.*, 594 S.W.2d 881, 883 (Ky. 1980); *City of Louisville* v. *Allen*, 385 S.W.2d 179, 184 (Ky. 1964)

20. **Louisiana—**
Lamb v. *Lamb*, 430 So.2d 51, 53 (La. 1983); *Gibson* v. *Bossier City Gen. Hosp.*, No. 22,693-CA, 1991 WL 249791 (La. Ct. App. Nov. 26, 1991); *Willis* v. *Louisiana Power & Light Co.*, 524 So.2d 42, 47 (La. Ct. App.), *cert. denied*, 525 So.2d 1059 (La. 1988)

21. **Maine—**
Werner v. *Lane*, 393 A.2d 1329, 1331 (Me. 1978)

22. **Maryland—**
Wernsing v. *General Motors Corp.*, 470 A.2d 802, 809 (Md. 1984); *Cam's Broadloom Rugs, Inc.* v. *Buck*, 590 A.2d 1060, 1063 (Md. Ct. App.), *cert. granted*, 597 A.2d 971 (Md. 1991)

23. **Massachusetts—**
Menard v. *McCarthy*, 571 N.E.2d 23, 26 (Mass. 1991)

24. **Michigan—**
Vargo v. *Denison*, 364 N.W.2d 376, 377 (Mich. Ct. App. 1985)

25. **Minnesota—**
Advanced Training Sys., Inc. v. *Caswell Equip. Co.*, 352 N.W.2d 1, 11 (Minn. 1984)

26. **Mississippi—**
Maxwell v. *Illinois Cent. Gulf R.R.*, 513 So.2d 901, 908 (Miss. 1987); *Screws* v. *Parker*, 365 So.2d 633, 634 (Miss. 1978)

27. **Missouri—**
Carnell v. *Dairyman's Supply Co.*, 421 S.W.2d 775, 776 (Mo. 1967); *Gilomen* v. *Southwest Mo. Truck Center*, 737 S.W.2d 499, 501 (Mo. Ct. App. 1987)

28. **Montana—**
Nelson v. *Flathead Valley Transit Auth.*, 824 P.2d 263, 266 (Mont. 1992); *Campbell* v. *Johnson*, 802 P.2d 1262, 1263 (Mont. 1990)

29. **Nebraska—**
Kumar v. *Douglas County*, 452 N.W.2d 21, 24 (Neb. 1990)

30. **Nevada—**
Hale v. *Riverboat Casino, Inc.*, 682 P.2d 190, 193-94 (Nev. 1984)

31. **New Hampshire—**
Hodgdon v. *Beatrice D. Weeks Mem. Hosp.*, 515 A.2d 1199, 1200 (N.H. 1986)

32. **New Jersey—**
Kaplan v. *Haines*, 232 A.2d 840, 848 (N.J. Super. Ct. App. Div. 1967), *aff'd*, 241 A.2d 235 (N.J. 1968)

33. **New Mexico—**
Martinez v. *Ponderosa Prods., Inc.*, 772 P.2d 1308, 1309 (N.M. Ct. App. 1988)

34. **New York—**
Zolli v. *DuBois*, 451 N.Y.S.2d 189, 190 (N.Y. App. Div. 1982); *General Exch. Ins. Corp.* v. *New York City Transit. Auth.*, 189 N.Y.S.2d 555, 558 (N.Y. App. Div. 1959)

35. **North Carolina—**
Bryant v. *Nationwide Mut. Fire Ins. Co.*, 329 S.E.2d 333, 343 (N.C. 1985); *Smith* v. *Pass*, 382 S.E.2d 781, 789 (N.C. Ct. App. 1989)

36. **North Dakota—**
Keyes v. *Amundson*, 391 N.W.2d 602, 604 (N.D. 1986)

37. **Ohio—**
Antal v. *Olde Worlde Prods., Inc.*, 459 N.E.2d 223, 225 (Ohio 1984)

38. **Oklahoma—**
Dodson v. *Henderson Properties, Inc.*, 708 P.2d 1064, 1065-68 (Okla. 1985)

39. **Oregon—**
Bradley v. *Gudeman*, 543 P.2d 1045, 1047 (Or. 1975)

40. **Pennsylvania—**
Westinghouse Elevator Co. v. *Herron*, 523 A.2d 723, 725 (Pa. 1987); *McIntyre* v. *Clark*, 461 A.2d 295, 297 (Pa. Super. Ct. 1983)

41. **Rhode Island—**
Menard & Co. Masonry Bldg. Contractors v. *Marshall Bldg. Sys., Inc.*, 539 A.2d 523, 527-28 (R.I. 1988)

42. **South Carolina—**
Folkens v. *Hunt*, 387 S.E.2d 265, 267 (S.C. 1990)

43. **South Dakota—**
Wangen v. *Knudson*, 427 N.W.2d 242, 244-46 (S.D. 1988)

44. **Tennessee—**
Campbell v. *Archer*, 555 S.W.2d 110, 112-13 (Tenn. 1977)

45. **Utah—**
Price-Orem Inv. Co. v. *Rollins, Brown & Gunnell, Inc.*, 713 P.2d 55, 57 (Utah 1986)

46. **Vermont—**
Corbin v. *Dickerson*, 586 A.2d 1104, 1106 (Vt. 1990); *Costa* v. *Volkswagen of Am.*, 551 A.2d 1196, 1198-99 (Vt. 1988)

47. **Virginia—**
Reel v. *Ramirez*, No. 911231, 1992 WL 76697 (Va. Apr. 17, 1992); *Bell* v. *Kirby*, 311 S.E.2d 799, 800 (Va. 1984)

48. **Washington—**
Robinson v. *Safeway Stores, Inc.*, 776 P.2d 676, 679 (Wash. 1989); *Byerly* v. *Madsen*, 704 P.2d 1236, 1238-39 (Wash. Ct. App. 1985)

49. **West Virginia—**
First Nat'l Bank v. *Blackhurst*, 345 S.E.2d 567, 574 (W. Va. 1986)

50. **Wisconsin—**
DeGroff v. *Schmude*, 238 N.W.2d 730, 735 (Wis. 1976); *Heideman* v. *American Family Ins. Group*, 473 N.W.2d 14, 21-22 (Wis. Ct. App.), *rev. denied*, 475 N.W.2d 584 (Wis. 1991)

51. **Wyoming—**
Coulthard v. *Cossairt*, 803 P.2d 86, 91 (Wyo. 1990)

TABLE 2

A. States That Permit Immediate Appeal Of Orders Granting A New Trial

1. **Alabama—**
   Ala. Code § 12-22-10 (1986)
2. **Arizona—**
   Ariz. Rev. Stat. Ann. § 12-2101(F)(1) (1982 & Supp. 1990)
3. **Arkansas—**
   Ark. R. App. P. 2(a)(3)
4. **California—**
   Cal. Civ. Proc. Code § 904.1(d) (West 1980 & Supp. 1991)
5. **Florida—**
   Fla. Stat. Ann. § 59.04 (West 1969)
6. **Idaho—**
   Idaho R. App. P. 11(a)(5)
7. **Indiana—**
   Ind. Code Ann. § 34-1-47-1(b) (West 1983 & Supp. 1991)
8. **Iowa—**
   Iowa R. App. P. 1(A)
9. **Minnesota †—**
   Minn. Stat. Ann. §§ 103.03(d), 105.01 (West Supp. 1991)
10. **Missouri—**
    Mo. Ann. Stat. § 512.020 (Vernon 1952)
11. **Montana—**
    Mont. Code Ann. § 25-21-1(b)(2) (1991)
12. **Nebraska—**
    Neb. Rev. Stat. § 25-1315.03 (1989)
13. **Nevada—**
    Nev. R. App. P. 3A(b)(2) (1991)

14. **New Hampshire—**
Hodgdon v. *Beatrice D. Weeks Mem. Hosp.*, 515 A.2d 1199, 1200 (N.H. 1986)

15. **New York †—**
N.Y. Civ. Prac. L. & R. 5701(a)(2)(iii), (c) (McKinney 1978)

16. **North Carolina—**
N.C. Gen. Stat. § 7A-27(d)(4) (1989)

17. **North Dakota—**
N.D. Cent. Code § 28-27-02(4) (1991)

18. **Ohio—**
Ohio Rev. Code Ann. § 2505.02 (Anderson 1991)

19. **Oklahoma—**
Okla. Stat. Ann. tit. 12, § 952(b)(2) (West 1988)

20. **Oregon—**
Or. Rev. Stat. § 19.010(2)(d) (1988)

21. **Pennsylvania—**
Pa. R. App. P. 311(a)(5)

22. **Rhode Island—**
Cotrona v. *Johnson & Wales College*, 501 A.2d 728, 729, 730-33 (R.I. 1985); *Kelly* v. *C.H. Sprague & Sons Co.*, 455 A.2d 1302, 1303 (R.I. 1983)

23. **South Carolina—**
S.C. Code Ann. § 14-3-3302(b) (Law. Co-op. 1977 & Supp. 1991)

24. **South Dakota—**
S.D. Codified Laws Ann. § 15-26A-3(3) (1984 & Supp. 1991)

25. **Washington—**
Wash. R. App. P. 2.2(a)(9)

26. **West Virginia—**
W. Va. Code § 58-5-1(i) (1966 & Supp. 1991)

27. **Wyoming—**
Wyo. R. App. P. 1.05(3)

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† Limits class of new-trial orders that are immediately appealable.

B. States That Permit Appeal Of New Trial Orders Following Judgment In Second Trial

1. **Alaska *—**
   Trobough v. *French*, 803 P.2d 384, 385 n.1 (Alaska 1990)

2. **Colorado—**
   Colo. R. Civ. P. 59(h) (Supp. 1989)

3. **Connecticut—**
   Conn. Gen. Stat. Ann. § 52-263 (West 1991); *Gold* v. *Newman*, 560 A.2d 960, 962-63 (Conn. 1989)

4. **Delaware *—**
   Del. Code Ann. tit. 10, §§ 144, 145 (1974 & Supp. 1990); Del. Sup. Ct. R. 42(b)(iii), (v)

5. **District of Columbia *—**
   D.C. Code Ann. § 11-721 (1981 & Supp. 1991); *Hairlox Co.* v. *McDonald*, 557 A.2d 163, 164 (D.C. 1989)

6. **Georgia *—**
   Ga. Code Ann. §§ 5-5-50, 5-6-33(a)(1), 5-6-34(b), 9-11-54(b) (Michie 1982 & Supp. 1991)

7. **Hawaii *—**
   Haw. Rev. Stat. § 641-1(b) (1988); Haw. R. Civ. P. 54(b); *Harkins* v. *Ikeda*, 557 P.2d 788, 790 (Haw. 1976)

8. **Illinois *—**
   Ill. Ann. Stat. ch. 110A, para. 301, 306(a)(1)(i) (Smith-Hurd 1989); *Hall* v. *Chicago & N.W. Ry. Co.*, 125 N.E.2d 77, 83-84 (Ill. 1955); *Robbins* v. *Professional Constr. Co.*, 380 N.E.2d 786, 788-89 (Ill. 1978)

9. **Kansas *—**

   Kan. Civ. Proc. Code Ann. § 60-2102(b) (Vernon 1967 & Supp. 1991); *In re Acquisition of Property by Eminent Domain*, 690 P.2d 1375 (Kan. 1984); *Daniels* v. *Chaffee*, 630 P.2d 1090 (Kan. 1981)

10. **Kentucky—**

    Ky. Rev. Stat. Ann. § 22A.020 (Baldwin 1988); Ky. R. Civ. P. 59.01

11. **Louisiana *—**

    La. Code Civ. Proc. Ann. art. 2083(4) (West 1961 & Supp. 1991); *Two Guys from Italy, Inc.* v. *O.P.A. Signs, Inc.*, 444 So.2d 745 (La. App. 1984); *Tebbe* v. *Avegno*, 435 So.2d 513 (La. App.), *writ denied*, 441 So.2d 753 (La. 1983); *Wright* v. *O'Neal*, 414 So.2d 880 (La. App. 1982), *aff'd in relevant part*, 427 So.2d 852, 853 (La. 1983)

12. **Maine—**

    Town of Eliot v. *Burton*, 392 A.2d 56, 58 n.2 (Me. 1978)

13. **Maryland—**

    Cam's Broadloom Rugs, Inc. v. *Buck*, 590 A.2d 1060 (Md. Ct. App.), *cert. granted*, 597 A.2d 971 (Md. 1991)

14. **Massachusetts—**

    Brooksbank v. *Epstein*, 363 N.E.2d 291, 292 (Mass. App. Ct. 1977)

15. **Michigan *—**

    Mich. R. App. P. 7.203; *Willett* v. *Ford Motor Co.*, 253 N.W.2d 111, 113 (Mich. 1977); *Denha* v. *Jacob*, 446 N.W.2d 303 (Mich. Ct. App. 1989)

16. **Mississippi *—**

    Miss. Sup. Ct. R. 5(a)(1); *Harrison* v. *Illinois Cent. R.R.*, 69 So.2d 218, 221-22 (Miss. 1954)

17. **New Jersey—**

    N.J. R. App. P. 2:2-1 to -5

18. **New Mexico—**
Martinez v. *Ponderosa Prods., Inc.*, 772 P.2d 1308 (N.M. Ct. App. 1988), *cert. denied*, 771 P.2d 981 (N.M. 1989)

19. **Tennessee *—**
Tenn. R. App. P. 9(2), 10; *Panzer* v. *King*, 743 S.W.2d 612, 614-15 (Tenn. 1988)

20. **Utah *—**
Utah Code Ann. § 78-2a-3(d) (1987 & Supp. 1991)

21. **Vermont ***
Costa v. *Volkswagen of Am.*, 551 A.2d 1196 (Vt. 1988)

22. **Virginia—**
Va. Code § 8.01-670(A)(3) (1950 & Supp. 1991); *Reel* v. *Rameriz*, No. 911231, 1992 WL 76697 (Va. Apr. 17, 1992)

23. **Wisconsin—**
Wis. Stat. Ann. §§ 808.03(1), (2)(a), 809.50(1) (West Supp. 1991); *Giese* v. *Montgomery Ward, Inc.*, 331 N.W.2d 585 (Wis. 1983); *Wick* v. *Mueller*, 313 N.W.2d 799, 804-05 (Wis. 1982) (Callow, J., concurring)

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* Also permits immediate appeal at discretion of appellate court.